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IN THE

Supreme Court of the United States

October Term 1963.

No. 252

et

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, Incorporated, a Florida corporation,

Petitioner,

against

A. A. P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. TV CORP., W. P. I. X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, Incorporated, a Florida corporation,

Respondents.

Petition for a Writ of Certiorari by Dave Fleischer, Individually and as Trustee and Receiver in Dissolution of Fleischer Studios, Inc., to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1964

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IN THE

Supreme Court of the United States

OCTOBER TERM 1963.

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of Fleischer Studios, Incorporated, a Florida corporation,

Petitioner,

against

A. A. P., Inc., ASSOCIATED ARTISTS PRODUCTIONS, Inc., U. M. & M. TV CORP., W. P. I. X., Inc., PARAMOUNT PICTURES, Inc., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, Inc, KING FEATURES SYNDICATE, Inc., FLEISCHER STUDIOS, Incorporated, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of Fleischer Studios, Incorporated, a Florida corporation,

Respondents.

Petition for a Writ of Certiorari by Dave Fleischer, Individually and as Trustee and Receiver in Dissolution of Fleischer Studios, Inc., to the United States Court of Appeals, Second Circuit.

Dave Fleischer, a resident of the State of California, respectfully petitions the Justices of the Supreme Court of the United States for a writ of certiorari to the United States Court of the Appeals for the Second Circuit to review the judgment of said Court decided March 23, 1964, which unanimously (1) affirmed an order of the United States District Court for the Southern District of New York, Palmieri, J., dated July 27, 1959, which dismissed the petitioner's antitrust cause of action against the de-

[illegible] Paramount Pictures Corporation and Paramount Pictures, Inc., on the merits and denied the motion of the petitioner for leave to serve a supplemental complaint so as to set forth his appointment as receiver of a dissolved Florida corporation, Fleischer Studios, Incorporated, (2) affirmed a judgment of said United States District Court, Ryan, Ch. J., granting the motion of all of the defendants (respondents herein) summarily dismissing the petitioner's action for an accounting and other relief and granting summary judgment to all defendants on September 14, 1959 (161a). The order of Paterson, J., was omitted (fn.) and hence not previously appealable.

(a) Opinions below.

The opinion of Paterson, J., dated July 15, 1959, is reported in 180 Fed. Supp. 738, and the pertinent portions thereof which are applicable on this petition are printed at pages 60a to 65a of the petitioner's appendix to the U. S. Court of Appeals.

The opinion of Chief Judge Ryan granting summary judgment dismissing the second amended complaint containing an accounting action is reported in 222 Fed. Supp. 41, and is printed at pages 145a to 161a of the petitioner's appendix to the U. S. Court of Appeals. Said opinion of Chief Judge Ryan was primarily based upon the decision of collateral estoppel by reason of a judgment in the cases of *Dave Fleischer v. W. P. I. X., Inc.*, and *Dave Fleischer v. F. F. A. Pictures, Inc.*, decided by Judge Harold Hart in the Supreme Court, New York County (1961), which dismissed plaintiff's complaint after trial. The opinion of Judge Hart is reported in 30 Misc. 2d 17.

The opinion of Kaufman, Circuit Judge, rendered March 21, 1961 is reported in F. 2d and appears at

page 263a of the record at the United States Court of Appeals. It is printed in the appendix to the within petition as appendix A at page 49, *infra*.

(b) Jurisdictional statement of grounds upon which a petition for a writ of certiorari is sought.

(i) The date of the judgment of the United States Court of Appeals, Second Circuit, sought to be reviewed is March 23, 1964, which is the date of its filing (see judgment 268a-269a).

(ii) The petitioner filed a timely petition for rehearing and rehearing *en banc* on April 2, 1964 (270a), which was denied on April 14, 1964 (278a), and no active Circuit Judge having requested that the case be reheard *en banc*, the said petition was denied on April 14, 1964 (283a). A petition for rehearing is timely made in the Second Circuit if made within 15 days of the date of the filing of the original opinion in said court (Rule 25[a], C. C. A. 2d). The motion for rehearing was made within 10 days of said judgment and was, therefore, timely. The 90th day for the filing of the within petition will fall on July 13, 1964.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is Title 28, U. S. Code, Section 1254(11).

(c) The questions presented for review.

Q1. Is the petitioner Dave Fleischer, *individually*, entitled to maintain the action for antitrust violations against the respondents Paramount Pictures, Inc., and its successor Paramount Pictures Corporation (hereafter Paramount respondents) where it clearly appears (a) that

the commerce of said individual petitioner was interfered with and destroyed by the Paramount respondents under two contracts dated May 27, 1938, and May 24, 1941, between Paramount respondents as distributor of motion picture cartoons produced by Fleischer Studios, Incorporated, of which petitioner was a 50 per cent stockholder, (b) petitioner *individually* was compelled to consent as such stockholder to the surrender to Paramount respondents of all of the real property and personal property consisting of a film library worth $10,000,000 belonging to Fleischer Studios because of a fictitious default brought about by Paramount's antitrust activities by means of which said film library was kept from the television market by Paramount respondents from 1941 until 1956 and when released resulted in hundreds of millions of dollars profit from their exploitation, (c) petitioner was individually placed in bondage to Paramount respondents and his commerce destroyed and interfered with by contractual provisions enforced upon him individually which deprived him of the use of his own name in the production of motion picture cartoons in perpetuity, (d) in being required to become exclusively employed in the production of motion pictures for distribution by Paramount respondents with five annual successive employment options granted to Paramount respondents, (e) with negative covenants restraining petitioner individually from competition with Paramount, (f) with options to purchase everything produced by petitioner individually granted to Paramount, (g) in being striped of the patents invented by petitioner needed to run his business, and (h) in being required to deliver his resignation in blank as director and officer of Fleischer Studios to Paramount, (i) all of which antitrust activities resulted in the involuntary dissolution of Fleischer Studios, Incorporated, in 1946 by proclamation of the Governor of Florida for non-payment of taxes.

Q2. Where, as here, the antitrust suit is for damages resulting from a single continuous wrong and from the cumulative effect of a contemplated series of acts to accomplish a common purpose and object, was it not error to hold that the cause of action accrued when the contract of May 24, 1941, was entered into, instead of holding that the cause of action did not accrue, and the applicable limitations did not begin to run until the common purpose and object of the conspiracy had been achieved by the sale in 1956 for television exploitation of the motion picture cartoons produced by plaintiff and Fleischer Studios, Incorporated?

Q3. Did the U. S. Court of Appeals, Second Circuit, in holding that plaintiff was barred under Florida law from maintaining the antitrust action in his capacity as "trustee in dissolution" or "receiver" of Fleischer Studios, Incorporated, because "all corporate claims not dealing with Florida real estate abate three years after the corporation is dissolved" decide an important state matter in conflict with the applicable Florida law?

Q4. Was the order of Judge George E. Holt of the Circuit Court of Dade County, Florida, dated December 19, 1957, appointing Dave Fleischer the receiver of Fleischer Studios, Incorporated, a dissolved Florida corporation, pursuant to Chapter 608, Florida Statutes (1957), entitled to full faith and credit under Article IV, Section 1, of the United States Constitution?

Q5. As interpreted by the U. S. Court of Appeals, Second Circuit, does not the alleged "abatement" Florida statute deprive the plaintiff of his property without due process of law in violation of Section 1 of the Fourteenth Amendment?

Q6. Where, as was shown by petitioner in opposition to the motion for summary judgment dismissing the ac-

counting action based upon the invocation of the doctrine of collateral estoppel defensively by defendants, that the judgments of the Supreme Court, New York County, were upon causes of action completely different from the cause of action for an accounting pending in the U. S. District Court, and the State Court refused to and did not pass upon the issues and that many important issues remained to be tried, was it not a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to have granted summary judgment dismissing the accounting cause of action without a trial?

(d) The constitutional provisions and statutes which the case involves.

(1) Dissolution of Florida corporations.

Fleischer Studios, Incorporated, was organized on July 21, 1938, and involuntarily dissolved by proclamation of the Governor of Florida on May 16, 1946, for failure to pay its corporate franchise taxes for a period of three years as provided in Section 4 of Chapter 16880, Acts of 1935, Laws of Florida. The law in its entirety is set forth in appendix B at page 52, *infra*.

This was the first law enacted by the State of Florida to compel delinquent corporations to pay their franchise taxes or to be *involuntarily dissolved*. It provides in Sections 9 and 10 thereof as follows:

> "Section 9: The directors of any corporation dissolved under the provisions of this Act shall be trustees for any property that may be owned by such corporation and shall handle and dispose of the same for the benefit of the stockholders *but the corporation as such, after being dissolved, shall have no corporate rights or be authorized to transact any business as a corporation.*" (Italics supplied.)

"Section 10: All laws and parts of laws in conflict with this Act be and the same are hereby repealed."

The law as to voluntary dissolution of Florida corporations had been previously enacted by Chapter 10096, Laws of 1925, and to the extent, if any, that was in conflict with the provisions for involuntary dissolution enacted ten years later as above shown, it was repealed. It provided in pertinent part by Section 44 for voluntary dissolution and by Section 45 for the continuation of the corporation, after dissolution for purposes of suit for the term of three years:

> "Section 45. *Continuation of Corporation After Dissolution, for Purposes of Suit, Etc.* All corporations whether they expire by their own limitations, or are otherwise dissolved, *shall nevertheless be continued for the term of three years* from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their assets, but not for the purpose of continuing the business for which said corporation shall have been established." (Italics supplied.)

That portion of the laws of 1925 dealing with voluntary dissolution of corporations is set forth in appendix C at page 55, *infra.*

The next legislation in point of time which is relevant to the inquiry here presented is Chapter 20895 of the Laws of Florida of 1941, effective June 12, 1941, or three years after the organization of Fleischer Studios, Incorporated, in 1938. Said law is captioned as "Providing Additional Duties and Powers for Trustees of Dissolved Corporations" fixing the length of time in which trustees of dissolved corporations may act as such trustees; prescribing the manner in which such duties and powers shall

be exercised, providing for the filling of vacancies in the trustees, etc. It specifically referred to corporations involuntarily dissolved under Section 9 of Chapter 16,880, Laws of 1935. Chapter 20895 of the Laws of 1941 (Florida) provided as follows in pertinent part:

> "SECTION 1. Trustees of any dissolved corporation and trustees of the property of any *dissolved corporation provided for under Section 9 of Chapter 16,880, Laws of Florida Acts of 1935, shall in addition to the power and authority respectively provided in said sections, be and continue as trustees of the property of such dissolved corporation for the benefit of the stockholders*, so long as such dissolved corporation holds of record in this state any right, title, interest, claim, lien or demand in, to or upon real property, *but in no event shall the term of such trustee exceed twenty years from the date of such dissolution.*" (Italics supplied.)

The foregoing was the first legislation which fixed the term of office of the trustees of dissolved corporations for a term of twenty years from the date of dissolution. Since the Fleischer Studios, Incorporated, was dissolved by proclamation of the governor of Florida on May 16, 1946, its two directors on the date of dissolution, Dave Fleischer and Max Fleischer, became its trustees in dissolution for a period of twenty years from said date or until May 16, 1966. As such trustees they had the right to handle and dispose of the corporate property as such trustees for twenty years. *But the corporation, as such, after being dissolved did not have any corporate rights nor was it authorized to transact any business as a corporation* (Section 9, Laws of Florida, 16,680-1935) from the date of its dissolution by proclamation of the Governor, on May 16, 1946.

In 1951 the General Provisions of the Corporation Laws of Florida were enacted as in Chapters 610, 611 and 612 contained.

Turning now to Sections 610.16, 610.17 and 610.18, Laws 1951, we find transferred to the Laws of 1951 these sections of the Florida law dealing with involuntary dissolution by proclamation of the governor of Florida which were transferred from the Laws of 1935, Chapter 16,880, quoted above. In a word the scheme of the Florida legislators was to put into Chapter 610 of the Laws of 1951 all previous laws dealing with involuntary dissolution. Again we find in 610.18 the effect of involuntary dissolution:

> "* * * The directors of any corporation dissolved as aforesaid shall be trustees for any property that may be owned by such corporation and shall handle and dispose of same for the benefit of the stockholders *but the corporation, as such, after being dissolved shall have no corporate rights or be authorized to transact any business as a corporation* * * *." (Italics supplied.)

In 1957 the confusion created by these separate provisions for involuntary and voluntary dissolution of Florida corporations was resolved by the repeal of Chapters 610 and 612 of the Laws of 1951 and the inclusion of a single such provision for both involuntary and voluntary dissolutions in a single Chapter 608 captioned Corporations and Business Trusts. This law was in 608.01 declared to be applicable and to extend to all corporations, but there was a saving clause as to past corporations as follows:

> "The validity of no corporation heretofore created nor the validity of any provision of any existing charter or certificate of incorporation or by-laws or any corporate action heretofore taken thereunder shall be in any way affected hereby; nor shall the effectiveness or validity of any property, grant, right, franchise or privilege heretofore acquired by any such corporation, or of its right thereto or possession thereof, be in any way affected hereby."

Under the 1957 laws voluntary dissolution is provided for in 608.27 while involuntary dissolution is provided for in 608.36.

Appointment of Receivers Under Florida Law.

There is a single provision for the appointment of receivers by the Circuit Court contained in 608.29 (1957) under which provision the plaintiff Dave Fleischer was appointed receiver herein, which law gives him the power "to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute in the name of the corporation or otherwise, all such suits as may be necessary or proper for the purpose aforesaid, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of such trustees or receivers may be continued as long as the Circuit Court shall find necessary for the purposes aforesaid" (see appendix D, page 60, *infra*, for entire provision).

Although plaintiff was appointed receiver by the Circuit Court of Dade County, the jurisdiction of said court was questioned collaterally by the U. S. Court of Appeals which held that the rights, remedies and property of Fleischer Studios, Incorporated, died three years after its dissolution on May 16, 1946, or on May 16, 1949; that with the expiration of the three-year period, Fleischer Studios, Incorporated, became defunct for all purposes and neither the corporation nor its trustees, nor any receiver appointed subsequent to the expiration of the three-year period has any status to maintain a suit because all claims abated three years after the corporation is dissolved.

(2) Florida Statute of Limitations on sealed instruments is twenty years.

Section 95.11 of the Florida Statute of Limitations provides in pertinent part:

> "95.11 *Limitations upon actions other than real actions.*
>
> "Actions other than those for recovery of real property can only be commenced as follows:
>
> "(1) Within twenty years. * * * an action upon a contract, obligation, or liability founded upon an instrument of writing under seal."

The contract of May 24, 1941, was under seal. It was executed in Florida and to be performed in Florida. Therefore, barring the application of the extreme doctrine of "abatement," the 20-year Florida Statute of Limitations would have been applicable, upon the liability founded upon the "instrument of writing under seal" which cause of action would not have been barred until May 24, 1961. The antitrust amended complaint was served on November 14, 1957.

(3) The illegality of contracts violative of the antitrust laws.

Sections 1 and 3 of Title 15, U. S. Code, provide:

> "Section 1. Every contract, combination, in form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several states, or with foreign nations, is declared to be illegal.
>
> "Section 3. Every contract combination in form of trust or otherwise or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, * * * is declared illegal."

(4) The suspension of limitations pending Government suit.

The antitrust action of *United States v. Paramount Pictures, Inc., et al.*, was commenced on July 30, 1938, in the U. S. District Court for the Southern District of New York and was pending until April 12, 1949 (see *Leonia v. Loews,* 117 F. Supp. 747, 762). Section 16 of Title 15 of the U. S. Code provided in the years 1938 to and inclusive 1950.

> "Whenever any suit or proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws based in whole or in part on any matter complained of in said suit shall be suspended during the pendency thereof."

(5) The enactment of the Uniform Federal Antitrust Statute of Limitations.

The uniform Federal Statute of Limitations in antitrust actions was enacted in 1955, 69 Stat. 283, enacting 15 U. S. C. Section 16(b), which became effective January 7, 1956. Under this statute, plaintiff had until January 7, 1960, to commence his antitrust action.

The antitrust action was commenced on November 14, 1957.

(e) A concise statement of the case containing the facts material to the consideration of the questions involved, in the antitrust cause of action which was dismissed on July 27, 1959, on the face of the pleadings, by Palmieri, D. J.

Fleischer Studios, Inc., was organized under the laws of New York in the year 1929, to make motion picture cartoons. Petitioner Dave Fleischer and his brother Max Fleischer, were its sole stockholders, each owning 50% of its stock and its only directors. In the years from 1929 to 1938, there were produced by Fleischer Studios, Inc. (N. Y.) ("Original Fleischer Corporation"), a huge cartoon film library which had cost $10,000,000, and which was owned by said corporation, free and clear. Dave Fleischer was the "Director" of said motion picture cartoons and Max Fleischer was the "Producer." This library included some of the film cartoon classics which have brought joy to millions of people throughout the world at the time of their creation in 1929 to 1941, and since their revival on television in the year 1956. These perennials include the Popeye cartoons, Betty Boop, Koko The Clown, etc. The film cartoons were distributed by respondent, Paramount Pictures, Inc. Respondent King Features Syndicate, Inc., was the owner of the comic strip Popeye, which appeared in syndicated columns of newspapers. In 1932, King Features, licensed Fleischer Studios, Inc. (N. Y.), to use the Popeye characters in the making of motion picture cartoons. Petitioner Dave Fleischer invented the character Bluto, as a foil to the diminutive Popeye. Petitioner Dave Fleischer and his brother Max, were the owners individually of many patents used in the making of said motion picture cartoons.

On or about the 27th day of May, 1938, the respondent, Paramount Pictures, Inc., entered into a conspiracy,

violative of the antitrust laws of the United States, with its employees, attorneys, servants, agents, distributors, exhibitors, affiliated subsidiary and associated corporations, the purpose and intent of which was to seize, destroy, capture and take unto itself the business and property of petitioner Dave Fleischer, defendant Max Fleischer, their patents and copyrights, the business of Fleischer Studios, Inc., N. Y., and of a corporation ultimately to be formed under the laws of the State of Florida, called Fleischer Studios, Incorporated, which assumed and became the owner of all of the property and assets of Fleischer Studios, Inc. (N. Y.) (31a).

By the aforesaid agreement of May 27, 1938, with Paramount Pictures, Inc., the "Original Fleischer Corporation" undertook to write, and create a motion picture cartoon called "Gulliver's Travels," and for the continued production of various other motion picture cartoons and to move its plant from New York to Miami. A loan of $100,000 was made by Paramount to "Original Fleischer Corporation" to finance such removal which as part of the conspiracy required *the hypothecation of the personal property of Dave Fleischer individually and that of Max Fleischer as well as that of the "Original Fleischer Corporation,"* with the impression falsely conveyed and representations falsely made by defendant Paramount Pictures, Inc., and its agents, that the returns from the distribution of said motion picture cartoons would be used to repay the said loans, to be amortized over a period of ten years (Comp. par. 28, p. 32a).

The provisions of Article Twelfth (g) and (h) of said agreement dated May 27, 1938, were in fact and were declared by the decree of the United States District Court for the Southern District of New York, entered April 21, 1949, in the suit in equity of the *United States of America v. Paramount Pictures, Inc.*, to violate the Clayton Act

and embody acts in restraint of trade (Comp. par. 29, p. 32a). The above provisions apply as well to renewals or exercise of options to produce other motion picture cartoons which Paramount Pictures, Inc., called for production (Am. Comp. par. 28, pp. 30a, 31a, par. 29a, p. 31a). On April 18, 1939, the agreement of May 27, 1938, was modified and assumed by Fleischer Studios, Incorporated, the Florida corporation, and the identical provisions which are violative of the Clayton Act were embodied in the modified agreement, and the production of additional motion picture cartoons were called for by the said modified agreement (Comp. par. 30, p. 36a).

The agreement of *May 27, 1938*, as amended and supplemented violated the antitrust laws of the United States by among other things, resorting to block booking of films, master agreements as to franchises, acquisition and use of theatres owned by affiliated companies or theatres owned by distributors either alone or jointly with defendant being used for distribution of films, discrimination against and favoring of exhibitors, suppression of films before their full release possibility had been achieved, booking of films of Fleischer Studios of Florida with its own films of inferior type and quality and the charging of a slight amount for the films of Fleischer Studios of Florida while taking the maximum amount for its own films and the rendition of false accounts to Fleischer Studios, Florida, made so because of the monopolistic and antitrust activities of Paramount Pictures, Inc. (Comp. par. 31, p. 36a).

Pursuant to the foregoing scheme, plan and conspiracy defendant Paramount Pictures, Inc., exercised an option under the agreement of May 27, 1938, to call upon Fleischer Studios, Florida, to produce an additional feature motion picture cartoon ultimately titled "Mr. Bug Goes To Town" and required the expenditure and commitment of

$[illegible] by said Fleischer Studios, Florida, on said feature film and other motion picture cartoons (Superman and Popeye) (Comp. par. 32, p. 37a).

Pursuant to the foregoing scheme, plan and conspiracy said defendant, Paramount Pictures, Inc., its agents, servants, employees and attorneys did on or about May 24, 1941, seize and take into its physical possession the plant and equipment of Fleischer Studios, Florida, and the personal property consisting of the film library covered by chattel mortgage including but not limited to the property which it had received by assignment from "Original Fleischer Corporation" and as its successor, set forth in paragraph 3 of the amended complaint; in furtherance thereof Paramount Pictures, Inc., stopped or threatened to stop the payroll of approximately $35,000 per week then outstanding because of commitments made by Fleischer Studios, Florida, *and threatened insolvency or bankruptcy proceedings against Fleischer Studios, Florida, unless said Dave Fleischer and Max Fleischer as sole stockholders of Fleischer Studios, Florida, consented to the sale and transfer and assignment of all the foregoing assets and all real and personal property, copyrights, films, trade-marks, patents owned by them individually and owned by Fleischer Studios, Florida, to Paramount Pictures, Inc., and executed the agreement dated as of May 24, 1941, waiving an accounting as to all past exhibitions of film cartoons by Paramount Pictures, Inc. That, under duress of property plaintiff, Dave Fleischer, defendant, Max Fleischer, and Fleischer Studios, Florida, and by reason of the force and coercion exercised upon them and the deception practiced upon them by defendant, Paramount Pictures, Inc., its agents, servants and employees, plaintiff (Dave Fleischer) and Max Fleischer made and executed the agreement dated as of May 24, 1941, annexed to the original complaint herein, individually*

and as officers of Fleischer Studios, Florida, and under like duress, coercion and force executed a bill of sale by separate instrument dated as of May 24, 1941, by Fleischer Studios, Florida, to Paramount Pictures, Inc., of all personal and real property belonging to it, a certificate of the stockholders and officers of Fleischer Studios, Florida, attesting same (Comp. par. 32, pp. 37a, 38a).

That it was part of the scheme, plan and conspiracy of the defendant, Paramount Pictures, Inc., its officers, agents and employees to continue such antitrust activities after May 24, 1941, by preventing the said Dave Fleischer and Max Fleischer individually from using the name Fleischer Studios, or the Dave Fleischer Studios, after the termination of their relationship with Fleischer Studios, Florida, but to compel them to become employed by said corporation to complete the film cartoons then in process of completion, under existing options, i. e., "Mr. Bug Goes to Town," 12, "Popeye" cartoons, 10, "Superman" cartoons and a two-reel feature cartoon called "The Raven" (Comp. par. 33, p. 38a).

Pursuant to said scheme, plan and conspiracy, the said Paramount Pictures, Inc., continued the objectionable parts of the agreement of May 27, 1938, in the agreement dated as of May 24, 1941 (i. e., block booking, etc.), in violation of the Clayton Act and *pursuant to said conspiracy the said defendant, Paramount, exacted from plaintiff, Dave Fleischer, and Max Fleischer an assignment of their shares of stock in Fleischer Studios, Florida, as collateral security for their individual performance of the agreement dated as of May 24, 1941, their resignations in blank, to be exercised at the will of said defendant, Paramount, and a negative convenant restraining said Dave Fleischer from competing with defendant, Paramount in the release of the tremendous film library obtained under duress, coercion and force practiced upon*

plaintiff (Dave Fleischer) and Max Fleischer. It was part of the aforesaid scheme, plan and conspiracy after obtaining said film library to hold the same for ultimate release by television when the said industry had sufficiently progressed to make said release commercially feasible. Prior to the forced and coercive assignment of the film library to defendant, Paramount Pictures, Inc., it had no interest in the television rights thereto; the film library had been assembled at a cost of ten million dollars to "Original Fleischer Studios" and it was the owner thereof free and clear of any debts or liens thereon; that Paramount's sole rights of release for television of films were in the motion picture cartoon "Gulliver's Travels" and a relatively small quantity of "Popeye" and "Superman" cartoons released in the year 1939 (Comp. par. 33, p. 38a).

Continuing said conspiracy, defendant, Paramount Pictures Corporation (successor to Paramount Pictures, Inc.), has withheld the said film library from distribution from 1949 until the year 1956, and has failed to cause to be distributed for television purposes either the film library or the "New Cartoons" made pursuant to the agreement dated as of May 24, 1941, to wit, "Mr. Bug Goes to Town" and other cartoons obtained by like transfer, from 1949 to 1956, during which time there was an active market for said film library and the "New Cartoons" for television purposes (Comp. par. 33, p. 38a).

(f) Contrary to the holding of United States Court of Appeals the second (antitrust) cause of action contains allegations tending to show direct injury to the commerce of the plaintiff Dave Fleischer as an individual.

In the instant case, it is a fact that Dave Fleischer was compelled as a stockholder of Fleischer Studios, Incorporated, to consent to the transfer of all of the property, real and personal, to the defendant, Paramount Pic-

tures, Inc., by the agreement of May 24, 1941. By that very agreement his individual competition was suppressed and his commerce was directly injured both as an individual and as stockholder of Fleischer Studios, Incorporated, as is shown by the contract itself.

Thus in Article FIRST of the agreement of May 24, 1941, it was provided (page 2 thereof) of (Exhibit A supplied to the Court).

> "Simultaneously with the execution and delivery of this agreement the parties hereto (Paramount Pictures, Inc., and Fleischer Studios, Incorporated) and *Max Fleischer and Dave Fleischer* will exchange general releases and discharges among themselves reserving solely their rights and obligations under this agreement and under the accompanying agreement executed and delivered by Paramount, Max Fleischer and Dave Fleischer simultaneously herewith."

In Article SECOND of the agreement of May 24, 1941, it was provided that the producer (Fleischer Studios, Incorporated) shall sell and transfer all of its property real and personal, to Paramount by proper and suitable instruments. This transfer required the consent of both Dave Fleischer and Max Fleischer as the owners of 50 per cent each of the outstanding common or voting stock of Fleischer Studios, Incorporated, to make it effective. This individual consent was given by Dave Fleischer.

By Article SECOND (e) of the agreement of May 24, 1941, Paramount stripped Max and Dave Fleischer of their patents and applications for patents "used or intended to be used in or in connection with the production of motion pictures or motion picture cartoons free of charge and without the payment of any royalties or sums whatsoever, but with the privilege of reserving the nonexclusive right (assignable only to a corporation or cor-

porations, not less than one-half of the stock of which shall be owned by either Max Fleischer or Dave Fleischer) to use such patents without the payment of any royalties or sums whatsoever to the Producer or Paramount, and such non-exclusive right may be exercised by either or both Max Fleischer and Dave Fleischer on behalf of either or both of themselves or on behalf of any person, firm or corporation by whom they may be employed but only during the period of such employment" (page 7, agreement, May 24, 1941). Thus Dave Fleischer was suppressed in his own commerce in the use of his own patents in competition with Paramount in the production of motion pictures and motion picture cartoons and he was the party whose commerce was directly injured by such competition (page 7, agreement, May 24, 1941).

The use of the names "Fleischer Studios," "Max Fleischer" and "Dave Fleischer" was exclusively reserved to Paramount at all times in and in connection with the production, distribution, use, exhibition and television by Article FOURTH of the agreement of May 24, 1941, whether during or after the period of the said agreement (p. 10, agreement of May 24, 1941). It is pursuant to the said provision of the agreement that the use of the name of "Dave Fleischer" is made upon television to this day throughout the world, and the commerce of "Dave Fleischer" is directly injured by such use in connection with the sale of merchandise on television.

By Article SIXTH of the agreement of May 24, 1941 (p. 13), Dave Fleischer is required to become employed for a period of 26 weeks thereafter to complete the motion picture cartoons called the "New Cartoons" on behalf of Paramount and he is even forbidden to work on the production of motion pictures as distinguished from motion picture cartoons and everything which he produces

is first to be offered to Paramount (p. 14 of agreement of May 24, 1941). Said provision is as follows:

> "As a provision of permitting Max Fleischer and Dave Fleischer to produce, supervise, direct or be connected with, or in any manner interested in, the production of motion pictures (as distinguished from motion picture cartoons), it is expressly agreed that Max Fleischer and Dave Fleischer will only perform services in connection with such motion pictures outside of the regular business hours during which they are to perform their services for the Producer, and that such services in connection with such motion pictures will not in any manner interfere with the rendition of their services to the Producer; *and, furthermore Paramount shall have the right to purchase and acquire any one or more of such motion pictures at any time after such motion picture or motion pictures shall be produced.* * * *"

By Article NINETEENTH of the agreement of May 24, 1941, it is provided:

> "Paramount shall also have the right, at its election, to use the name and trade-mark of the Producer (Fleischer Studios, Incorporated) and the names Fleischer, Max Fleischer and Dave Fleischer and any one or more of them in or for any screen or other credits and in or for any advertising, exploitation or publicity matters, in or in connection with the new cartoons * * *" (agreement, May 24, 1941, page 44).

By Article TWENTY-THIRD of the agreement of May 24, 1941, Paramount was granted five successive annual options, the fifth of which was to end on May 23, 1947, to call upon the Fleischer Studios, Incorporated, for the production of motion picture cartoons and motion pictures which Paramount may from time to time designate or request (p. 50 of agreement of May 24, 1941).

By the letter agreement of May 24, 1941 (annexed to Exhibit A), signed by Dave Fleischer, he was required to perform the contract undertaken by Fleischer Studios, Incorporated, as collateral security for the performance of the obligations of the corporation and to sign all instruments in connection with the said sale, of all of the assets and property of the corporation, which included his consent as 50 per cent stockholder, to the sale of such property to Paramount and the negative covenant and the consent to the use of his name and that of Fleischer Studios by Paramount.

(g) The basis for federal jurisdiction in the court in the first instance for the antitrust cause of action is Title 15, Section 15 of the U. S. Code, it being an action brought by the plaintiff Dave Fleischer in his individual capacity and as cotrustee with defendant Max Fleischer of Fleischer Studios, Incorporated, a Florida corporation, dissolved by proclamation of the Governor of the State of Florida for nonpayment of franchise taxes on or about May 16, 1946, against the defendants Paramount Pictures, Inc., its successor Paramount Pictures Corporation and defendant Max Fleischer as said cotrustee (Am. complaint, Par. 25, p. 31a).

(h) A concise argument amplifying the reasons relied on for the allowance of the writ as to the antitrust cause of action.

(1) Circuit Judge Kaufman erroneously asserted that "Apart from the merits of Fleischer's claims, several factors justify the dismissals below, which are hereby affirmed. When the conclusory allegations of the complaints are pierced, be they characterized as 'antitrust' or 'accounting' claims, it becomes apparent that plaintiff

is simply asserting that Paramount has violated the express or implied terms of a 1941 contract. And since that agreement was not with Fleischer individually, but with Fleischer Studios, Inc., it is equally clear that Fleischer may not secure a personal recovery for an alleged wrong done to his corporation" (265a). Although petitioner does assert that Paramount has violated the express or implied terms of the agreement of May 24, 1941, he asserts also that said contract was illegal and indivisible. Under Sections 1 and 3 of Title 15 U. S. Code, the contracts enforced upon Dave Fleischer and Max Fleischer as well as upon Fleischer Studios, Inc. (of New York and Florida), were declared to be illegal. The contracts may have been cast in the form of a corporate obligation to produce motion picture cartoons, but actually when the form of these illegal contracts is disregarded, the contracts are for the rendition of personal services by Dave Fleischer as "Director" and Max Fleischer as "Producer" of the motion picture cartoons, with negative covenants enforced upon the petitioner, renewal options for his employment for a period of five years, a consent, as 50% stockholder, to the transfer of the corporate assets to Paramount, a permanent injunction against the use of his own name in business, the lifting of his own patents by Paramount, and the delivery of his resignation in blank to Paramount to be exercised at its own will or caprice.

There are a number of instances where the corporate fiction has been disregarded and the "mere instrumentality" doctrine invoked where the purpose and intent to violate the Clayton Act has been apparent to the Court. Professor Latty has outlined some of these cases in his book *Subsidiaries and Affiliated Corporations* (1936) at page 56 where he says in pertinent part:

> "Sec. 11. *Clayton Act* * * * Thus, under the section of that act, which aims to prevent acquisition

> of the stock of a corporation by another corporation where the effect may be to lessen competition between the two corporations (38 Stat. 731, 15 U. S. C. A. Sec. 18), it was held, without resorting to the language of the act which expressly covered *indirect* acquisition, that the act had been violated where a corporation organized a *subsidiary, which in turn acquired the stock* of three other corporations which were competitors of the parent (*Federal Trade Commission v. Thatcher Mfg. Co.*, 5 F. [2d] 615 [CCA3d, 1925], modified 272US554). * * * The purpose of the act, as is evident from various sections, is to prevent the creation of a monopoly or substantial lessening of competition through certain devices. If those devices are employed through a wholly owned and controlled corporation so that the same end is attained which it is the purpose of the statute to prevent, it is to be expected that the controlled corporation will be designated a 'mere instrumentality.'"

(2) The contracts of May 28, 1938, and May 24, 1941, are clearly violative of the antitrust laws in that they permit block booking of films produced by the Fleischers with other films produced by Paramount and its subsidiaries. The result is that in this accounting setup of defendants Paramount, it was able to allocate the better part of the income received by it to its own product while the hardy perennials of Fleischer were withdrawn from the market from 1941 to 1956, only to be sold at fabulous sums of money for television purposes when they had ceased being competitive with the Paramount product.

The applicable rule was succinctly applied by this Court in the case of *Bruce's Juices, American Can Company*, 330 U. S. 743 at p. 755 and in *Timken Roller Bearing Co. v. United States*, 341 U. S. 593. "That where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgments sought, the Court will entertain

the defense that the contract in suit is illegal under the express provisions of that statute."

In the Restatement of the Law of Contracts, §518, it is said:

> "§518. DIVISIBLE PROMISES IN RESTRAINT OF TRADE:
>
> "Where a promise in reasonable restraint of trade in a bargain had added to it a promise in unreasonable restraint the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; *but if full performance of a promise indivisible in terms, would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.*"

Williston on Contracts, Volume V, §1659, page 4680, writing on *Divisibility of promises imposing excessive restraint*, says:

> "If, however, a promise is not only wider than is *permissible, but is also indivisible, most courts will not attempt to give partial effect to the promise, but the whole will fall.*"

At page 4682, Williston says:

> "Due to the difference in emphasis in America and England the Restatement of Contracts (17. §518. *Acc. Universal Film Exchanges v. West*, 163 Miss. 272, 141 S. 293; *Lufkin Rule Co. v. Fringelli*, 57 Oh. St. 596, 49 N. E. 1030) states this new rule as invalidating the reasonable clauses of a divisible covenant when the whole is part of a plan to obtain a monopoly, while the English courts have applied it to an employee's divisible covenant which is obviously oppressive and unreasonable."

The single purpose clearly discernible from the within antitrust complaint stated against the conspirators, Paramount, its agents, servants and employees, is the seizure of the film library and real property of Fleischer Studios,

Incorporated, by Paramount Pictures, Inc., the removal of Dave Fleischer and Max Fleischer from competition with Paramount, the withholding of the film library from release on television in competition with the motion picture product of Paramount and the ultimate outright sale of the Fleischer film library free of any obligations to the petitioner.

Judge Palmieri has held that the statute of limitations began to run on May 24, 1941, the date on which the said contract was exacted from the Fleischers by Paramount, and not in 1956 when the Fleischer product was sold for exhibition on television.

It has been held that in antitrust actions involving a continuous wrong from the effect of a series of acts designed to accomplish a common object and purpose that, the cause of action does not accrue, and applicable limitations do not begin to run until the common purpose and object of the conspiracy had been achieved. This rule is set forth in the opinion of Nevins, J., in the case of *Winkler Koch Engineering Co. v. Universal Products Co.* (1951), 100 F. Supp. 15, where in a case exactly applicable to the facts in this case he said in pertinent part:

> "The facts alleged in the complaint (which for *the purpose of this* separate trial are to be taken *as true) establish a single wrong and constitute a single cause of action.*
>
> "Where, as here, the suit is for the damages resulting from a single continuous wrong and from the *cumulative effect of a contemplated series of acts designed to accomplish a common purpose and object, the cause of action did not accrue, and applicable limitations did not begin to run until the common purpose and object of the conspiracy had been achieved.*

> "The multiple cause of action rule adopted and applied in certain antitrust cases which appears to require that applicable limitations begin to run from the time each overt act occurs or each item of injury is sustained is not applicable to the facts of the case at bar.
>
> • • • • • •
>
> "Considering also the single nature of plaintiff's cause of action, and giving effect to the federal rule of construction of statutes of limitations in cases involving fraud, plaintiff is not barred from recovery of damages against any defendant from any date."

(2) Circuit Judge Kaufman, erroneously states the Florida law on abatement of causes of action to be three years after the corporation was involuntarily dissolved by proclamation of the Governor of Florida in 1946, citing for his authority a 1961 statute, and a decision of a United States District Judge for the Southern District of New York (Weinfeld, J.), in *Walder v. Paramount Publix Corp.* in a case which involved a voluntary dissolution of a corporation.

Kaufman, C. J., said (265a-266a):

> "While plaintiff attempts to invoke his status as 'trustee in dissolution' or 'receiver' of the corporation, he is nonetheless barred. Under Florida law, corporate claims not dealing with Florida real estate abate three years after the corporation is dissolved. *Fla. Stat. Ann. Sections*, 608.29, 608/30 (1961); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 917-19 (S.D.N.Y. 1955), and the present suit was filed more than eleven years after the demise of Fleischer Studios."

Mr. Justice Douglas in the case of *Bernhardt v. Polygraphic Company of America*, 350 U. S. 202 at page 205, said with respect to the erroneous application of New York law by the U. S. Court of Appeals, Second Circuit,

in a case which should have been decided under Vermont law:

> "As we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule."

In the instant case the Florida law is free from doubt or ambiguity. The shadow of doubt is cast, not by Florida Judges who have an enlightened view of the corporate law, but by New York Judges who have placed the Florida lawmakers and Judges in the role of confused thinkers in the field of corporate law on dissolution.

The three-year period after dissolution under Florida law during which a Florida corporation may transact business to wind up its affairs applies only to corporations voluntarily dissolved under Chapter 10096 of the Law of 1925 (Florida). It does not apply to a corporation involuntarily dissolved under the later enactment, Section 9 of Chapter 16880, Law of 1935 (Florida), which provided that the directors of a corporation involuntarily dissolved "shall be trustees for any property owned by such corporation and shall handle and dispose of the same for the benefit of the stockholders but that the corporations as such after being dissolved, shall have no corporate rights or be authorized to transact any business as a corporation." Dave Fleischer was properly appointed receiver of the Fleischer Studios, Incorporated, and the denial of his motion to have himself added as a party-plaintiff in such capacity was the denial of full faith and credit to the order of the Circuit Court of Florida which recognized the right of Dave Fleischer as "receiver" to administer the assets of the dissolved, Fleischer Studios, Incorporated.

In the case of *Gerstel v. William Curry's Sons Company, a Florida Corporation,* 25 So. 2d 560, the involuntary dissolution statute here in question, Chapter 16880, Laws of 1935, was passed upon by the Florida Supreme Court. The defendant corporation, Wm. Curry's Sons Company, was dissolved in 1936 under said law, for non-payment of its franchise taxes. Its officers formed a new corporation by the same name and assigned all of the assets of the former to the latter. The former had made a note of $6,000 in 1931, and when the successor was sued in 1941 on the said note, it successfully pleaded the three-year statute of limitations below as a defense to the action. In reversing the lower court, the highest court of Florida said:

> "* * * Under this state of facts the trial court held that the dissolution of the old corporation extinguished its debts, and that they did not survive the three-year provision of the statute for prosecuting claims against it, that Chapter 16880 did not violate the due process clause, the equal protection or the contract clause of the state and federal constitution, that the new corporation did not become responsible for the debts of the old corporation and was barred by the statute of limitations.
>
> *"We find ourselves unable to agree with the trial court's judgment. * * * The rule of the common law is obsolete and has long been superseded by statute in this state. Under the law of this state when a corporation is dissolved, its assets are first used to pay valid claims against it and if any remain, they are distributed among its shareholders.*
>
> *"We do not think that when a corporation is dissolved by the Governor as provided in Chapter 16880, Acts 1935 (Sections 610.16 to 610.18 Florida Statutes 1941), the three year prolongation period is available for the purpose of closing its business. The very terms of Section 9 of the Act support this view and the decisions of the New York Courts*

from which state it was derived support it. Seventy-three First Ave. Corp. v. Braunstein Bros., 168 Misc. 842, aff'd 170 Misc. 657. *Application of S. M. & J. Eisenstadt*, 256 App. Div. 488. Any other holding would be contrary to Section 33, Article 3 of the constitution providing that no statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage.

"It follows that the enactment of Chapter 16880, Acts 1935, did not shorten or otherwise affect the statute of limitations barring collection of the note.

"The Court below apparently took the position that since the old corporation was dissolved under Chapter 16880, Acts 1935, Section 9 of which provided that the corporation as such shall have no corporate rights or be authorized to transact any business as a corporation it was thenceforth dead and that its successor, the new corporation, could under no circumstances become responsible for its debts and obligations. If Chapter 16880 had been complied with this might have been true, but it imposed no penalty for failure of a dissolved corporation to comply with it."

Spector v. Hart, 139 So. 2d 923 (1962), and *McClung v. Hill*, 96 F. 2d 236 (1938), stands for the proposition that under Section 9 of Chapter 16880, Laws of 1935 (Florida), the involuntarily dissolved corporation is not "dead" but merely without power to carry on business in corporate name or form, which disability may be corrected by the payment of the arrears in franchise taxes tha have accrued during the three-year period of non-payment, prior to involuntary dissolution.

In the *Spector v. Hart* case, the Florida Court of Appeals, per Allen, J. held that Lester Hart, president of Lester Hart Galleries, Inc. (an involuntarily dissolved corporation), was not liable on a lease which he signed as president of the dissolved corporation during a period of

disability where Hart had procured the dissolved corporation to be reinstated by the payment of three years' taxes in arrears, while the action was pending against him. It was in this connection that Allen, J., cited *McClung v. Hill*, with approval and quoted from Hornstein on Corporations as follows:

> "Whether the penalty for franchise tax delinquency be suspension or forfeiture, its objective is simply to produce revenue to prevent use of corporate form without compensation to the State" (2 Hornstein, Corporation Law and Practice, Sec. 812 [1959] p. 354).

Even in the case of a corporation which is voluntarily dissolved the Supreme Court of Florida, in the case of *Neville v. Leamington Hotel Corporation* (47 So. 2d p. 81), has permitted the appointment of a receiver after the three-year period of limitations applicable to such voluntarily dissolved corporations where it cannot close its affairs in three years. The late Chief Judge Terrel, writing for the Florida Supreme Court said:

> "We are convinced that the reasonable interpretation of Section 612.47 F.S.A. is to continue the life of any dissolved corporation for three years in order that it may settle and close its business, convey its properties and distribute its assets. Any suit that may be necessary to do this may be brought after dissolution of the corporation. *If it is insolvent and cannot close its affairs as provided in this section, then a receiver may be appointed as provided in Section 612.50 F.S.A. Remedial statutes such as this should always be construed so as to afford relief rather than to deny it if parties move promptly and allege facts that state a cause of action.*" (Italics supplied.)

Certainly the *Neville* case, *supra*, destroys the argument that a receiver may not be appointed after the lapse of three years from the date of dissolution. 612.47 F.S.A.

(1951) is the identical statute (Section 48) which existed in Ch. 10096, Laws 1925, (see appendix B), which provided that "the powers of such trustees or receivers may be continued as long as the Circuit Court shall think it necessary for the purposes aforesaid." It is the identical section under which the petitioner was appointed receiver, by Circuit Judge Holt on December 5, 1957, pursuant to Chapter 608 F.S. 1957 (see appendix to main record, pp. 56-a to 59-a and appendix D to this petition).

The foregoing order of the Circuit Court of Dade County, Florida (Holt, C. J.), is presumptive evidence of its contents and is entitled to full faith and credit in this Court under the United States Constitution and cannot be attacked collaterally, under Article IV, Section 1 of the United States Constitution.

Cooper v. Newell, 173 U. S. 567;
Wisconsin v. Pelican Ins. Co., 127 U. S. 291;
Swift v. McPherson, 232 U. S. 51;
Hampton v. McConnell, 3 Wheat. 234;
Pennington v. Gibson, 16 How. 81;
Cheever v. Wilson, 9 Wall. 128;
Insurance Co. v. Harris, 97 U. S. 336;
Gibson v. Lyons, 115 U. S. 439;
U. S. v. Mason, 218 U. S. 115.

As was said in the *Walder* case, *supra*, by Weinfeld, J.:

> "The decisions of corporate dissolution are 'not procedural or controlled by the rules of court in which the litigation depends' rather are they matters which rest wholly with the state of incorporation and over which the Federal Government has no control."

The denial of his day in court to the petitioner by Circuit Judge Kaufman, at the U. S. Court of Appeals, Second Circuit, by U. S. District Judges Palmieri and Chief Judge Ryan and by Judge Harold Baer of the

Supreme Court, New York County, was therefore contrary to the Florida law, which is controlling.

(3) Since the three-year period of abatement invoked by the Circuit Court is not applicable, the only period of limitation applicable is the 20-year period of limitation contained in Section 95.11 of the Florida statutes, applicable to "actions other than those upon a contract, obligation, or liability founded upon an instrument of writing under seal." The within action was commenced in November, 1957. The statute would not be a bar until May 24, 1961, or 20 years after the date of the agreement dated May 24, 1941, which is Exhibit A supplied to the Court below and to this Court.

(4) The uniform federal four-year statute of limitations in antitrust actions was enacted in 1955 (69 Stat. 283, 15 U. S. C. Section 16[b]) but this did not become effective until January 7, 1956. Thus, the petitioner had until January 7, 1960, to commence his action under the antitrust statute and the action was timely commenced on November 14, 1957.

(5) The antitrust action was dismissed on the pleadings and not on the merits. The action of the U. S. Court of Appeals, Second Circuit, in dismissing the said cause of action based on the three-year Florida law of "abatement" and because the petitioner did not have an individual cause of action is clearly erroneous.

(e) A concise statement of the case in the accounting (first) cause of action containing the facts material to the consideration of the questions presented.

(A) Although Judge Palmieri dismissed the antitrust cause of action on July 27, 1959, on the grounds that the petitioner had no individual cause of action and that the corporate cause of action had abated, he held that the

fact that the cartoons in which petitioner had an interest were withheld from the television market from 1941 to 1956 "has no bearing in this complaint on any claim under the antitrust laws. It does not bear on plaintiff's rights, if any, growing out of the sale of the cartoons while they were in defendants' possession. These matters are cognizable under the first (accounting) cause of action" (68a).

Section I of Title 15, U. S. C., provides in pertinent part that:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several states or with foreign nations, is declared to be illegal."

The crux of the first cause of action for an accounting lies in the treatment to be afforded to a contract which is clearly in violation of the antitrust laws but under which one of the contracting parties (Paramount) holds the property of its victim from the market, and subsequently sells the property at a huge profit to third parties. Are the distributees and purchasers of the victim's property immune from an accounting for the victim's property? It is in this context that the first cause of action is spelled out.

By the first cause of action the petitioner claimed that Paramount had obtained possession and control of the huge film library of Fleischer Studios, Inc. (New York and Florida), by means of practices and agreements which violated the antitrust laws and that they conspired with the defendant Max Fleischer on or about December 20, 1955, to destroy and eliminate the rights of the petitioner in 12 Popeye cartoons and a picture called The Raven for which they paid to said Max Fleischer the sum of $3,500 (24a).

It is further alleged that Paramount sold 119 Popeye cartoons to defendants A. A. P., Inc., and Associated Artists Productions Corporation for $1,500,000 and that said cartoons have been distributed by all of the remaining defendants on television without compensation to the petitioner or to Fleischer Studios, Incorporated, Florida.

Petitioner demanded the very accounting to which Judge Palmieri said he was entitled under the first cause of action. In addition to defendants Paramount, there were included as parties defendant in the first cause of action, A. A. P., Inc., and Associated Artists Productions, Inc., as distributors of the 119 Popeye cartoons, U. M. & M. TV Corp. as distributor of The Raven, W. P. I. X., Inc., as licensee of the Popeye cartoons, Dumont Broadcasting Corp. as licensee of The Raven, Flamingo Films, Inc., as licensee of Superman cartoons and King Features Syndicate, Inc., for having revived, sold and distributed the Popeye cartoons along with Paramount defendants without compensation to plaintiff.

All of the defendants (except defendant Max Fleischer) moved for summary judgment under Rule 56(b) F.R.C.P. in January and February, 1953, before Chief Judge Ryan "on the grounds that there is no issue as to any material fact, and that said defendants are entitled to a judgment as a matter of law" (81a, 85a, 87a, 89a, 91a). In support of the motion defendants attached the pleadings in two actions commenced by Dave Fleischer in the Supreme Court of the State of New York, County of New York (Exhibit B), being an action brought against N. T. A. Pictures, Inc., for a declaratory judgment with respect to the motion picture cartoon, Mr. Bug Goes to Town, which had been sold by Paramount Pictures Corporation to N. T. A. Pictures, Inc., and (Exhibit C) being an action brought individually by Dave Fleischer against W. P. I. X., Inc., for a violation of Sections 50 and 51 of the New

York Civil Rights Law, i. e., the invasion of the rights of privacy of Dave Fleischer. The latter statute is a penal statute.

In affirming the granting of summary judgment by Chief Judge Ryan predicated upon the appellees' plea of collateral estoppel, Circuit Judge Kaufman held that the rights and obligations of Paramount under the 1941 contract as well as Fleischer's inability to recover for injuries suffered by his corporation, were determined adversely to the plaintiff by the New York State Courts. The latter ruling was predicated upon the former holding of Judge Palmieri, so that what we have here is an estoppel by reason of the very decision from which an appeal could not have been pressed because the ruling of Judge Palmieri was interlocutory (see footnote 1, Opinion, Kaufman, C. J.).

In addition Circuit Judge Kaufman asserts that the issues were the same in the State Court actions as in the accounting action and have been fully litigated Petitioner has shown that in at least eight instances the issues were not the same and were not litigated. It is submitted that to deprive plaintiff of the right to trial on a showing that the matters in issue were specifically not tried by the State Court which are at issue in this accounting action is to deprive plaintiff of his property without due process of law.

(g) The basis for federal jurisdiction in the first instance of the accounting action was diversity of citizenship and a cause of action in part predicated upon the Copyright Laws of the United States (Title 17 U. S. Code and Title 28, Sections 1331, 1332, 1338 and 1400).

(b) A concise argument amplifying the reasons relied on for the allowance of the writ as to the accounting action.

1. The doctrine of collaterale stoppel cannot be invoked where the Judge in the first case had no legal authority to, or deliberately did not, pass upon issues and matters vital to a determination of and left open for decision in the first case remain undecided. The application of such doctrine in this case deprives the plaintiff of his property without due process of law.

In the case of *Ripley v. Storer*, 309 N. Y. 506, 518, cited by the Paramount-appellees, the New York Court of Appeals, per Van Voorhis, J., said:

> "The pleadings, decision and judgment in the EAGER trial were admitted in the record on this appeal. The testimony was offered in evidence but excluded and marked for identification. The established rule is that record evidence which is clearly identified may be considered on appeal under such circumstances. 'This has frequently been decided in respect to records of judgments, exemplification of bankrupt discharge, certificates of naturalization, etc. * * * Evidence of this character is received by the appellate court for the reason that being incontrovertible, it would be idle to send the case back for a new trial for the sole purpose of admitting it' (citing cases). We may therefore consider the evidence in the EAGER record, even though it was excluded, if it be material to the issue as it clearly is. In Black on Judgments the author states concerning *res judicata*, 'It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial' (citing *Carleton v. Lombard Auers*, 149 N. Y. 137)."

The motion for summary judgment was made by Paramount-appellees upon *Exhibit A*, a copy of the agreement of May 24, 1941; *Exhibit B*, the amended complaint and answer thereto in the action of Dave Fleischer against N.T.A. Pictures, Inc., *et al.*; *Exhibit C*, the amended complaint in the action of Dave Fleischer against W.P.I.X., Inc., and answer thereto; *Exhibit D*, the opinion of Justice Owen McGivern ordering a joint trial without consolidation of the above mentioned two actions; *Exhibit E*, fragmentary quotations from the agreement between Paramount-appellees and National Telefilm Associates, Inc. (N.T.A.), dated September 28, 1956, allegedly containing indemnification by Paramount to N.T.A., the defendants in the above first mentioned action; *Exhibit F*, infinitesimal fragments from a 1,000-page examination before trial of plaintiff.

The record of the trial of 593 pages and the thousands of exhibits presented before Judge Baer were not offered by the Paramount-appellees in support of their motion for summary judgment.

2. The record of the trial before Judge Baer shows that he excluded evidence of the status of the television industry in 1941 when the agreement of May 24, 1941, was executed to prove that it did not contemplate that the motion picture cartoons made by Fleischer Studios, Incorporated, and directed by Dave Fleischer would be projected for the sale of refrigerators, iceboxes and other products, since such use was unknown and not in existence at the time the contract of May 24, 1941, was executed (112a-113a).

Judge Baer ruled against the plaintiff David Fleischer when he offered to prove that Dave Fleischer and Max Fleischer participated in the very first television broadcast in the City of New York in 1930 and that the status of the motion picture and television industry in the year

1941 did not contemplate the use of motion picture cartoons for the sale of refrigerators, iceboxes and other products (112a-113a). Plaintiff offered to prove before Judge Baer that when you give a person the right to use your name or your picture in a motion picture, you give it with respect to the status of the industry at the time the contract was made and commercial advertising as it is known (Baer testimony, p. 537) at the time the contract is executed.

Judge Baer refused the offer of testimony saying:

> "*The Court* (Baer, J.): *It is not pertinent here. If you are telling me it is pertinent under the Civil Rights Law, I say you are wrong. If you are telling me it is pertinent on the N.T.A. case I don't see how it could possibly be pertinent* (s. m. p. 537, Baer minutes).
>
> "Mr. Garfield: *All I want to do is to prove the status of the industry.*
>
> "The Court (Baer, J.): *I will not let you prove the status of the industry*" (113a).

Since proof of the status of the television and motion picture industry was held to be irrelevant to the decision of the state court actions tried before Baer, J., it was not decided in those cases and was an open question before Chief Judge Ryan on the motion for summary judgment (see *Ettore v. Philco Television Broadcasting Co.*, 229 F. 2d 481 [3rd Cir. 1956], cert. den. 351 U. S. 926).

The use by all of the defendants in the first cause of action of the names of DAVE FLEISCHER and FLEISCHER STUDIOS, in the sale of products contrary to the manner envisaged by the parties to the contract of May 24, 1941, created a right of action not resolved in the trial before Judge Baer and fully open for determination before Chief Judge Ryan. The latter overruled the plea of the plaintiff to have a trial on the issue of status of the industry (see affidavit of Dave Fleischer, pp. 144a to

119a). This ruling of Ch. Judge Ryan is error. This matter is treated factually in the affidavit of Dave Fleischer in opposition to the motion for summary judgment at pages 111a to 119a and there is no denial or refutation by any person in opposition to said allegations. They are therefore deemed to be true for the purposes of the motion and every inference must be drawn in favor of the plaintiff (*United States v. Diebold*, 369 U. S. 654). In the *Diebold* case the Supreme Court of the United States said:

> *"In any event both findings represent a choice of inferences to be drawn from subsidiary facts contained in affidavits and depositions, submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this leads us to believe that inferences contrary to those drawn by the trial court might be permissible."*

Plaintiff's cause of action tried before Judge Baer against W.P.I.X., Inc., was "predicated upon a violation of the plaintiff's rights of privacy and the remedies afforded to him by Sections 50 and 51 of the Civil Rights Law of the State of New York of which provisions plaintiff request(ed) th(e) court to take judicial notice" (amended complaint, Dave Fleischer v. W.P.I.X., Inc., par. 2, Exhibit C).

A cause of action under Sections 50 and 51 of the New York Civil Rights Law is brought under a penal law which makes it a misdemeanor when "a person, firm or corporation uses for the purposes of trade, the name * * * of any living person without first having obtained the written consent of such person" (Sec. 51, Civil Rights Law).

The civil equitable action permitted for a violation of the penal provisions of Section 50 is covered by Section

51, Civil Rights Law. Such an action is cognizable for use of a person's name *"within this state (New York)"* and the person whose name has been used within the State of New York may *"maintain an equitable action in the supreme court of this state (New York)* against the person, firm or corporation so using his name, • • • to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use • • •."

The decision of Judge Baer (30 Misc. 2d 17) was limited to the effect of the use of the plaintiff's name in the State of New York and under the Civil Rights Law, Sections 50 and 51 above quoted from. The complaint of Fleischer v. W.P.I.X., Inc., was that its television station was operated within the City of New York (comp., 31, Exhibit C) and Judge Baer distinctly held that, within that complaint, proof of the status of the industry in 1941 was not pertinent to the issue. *But it is pertinent to the issue in this action.*

By contrast the complaint in the instant action which was dismissed by Chief Judge Ryan complains of the television broadcast authorized by defendants A.A.P., Inc., and Associated Artists Productions, Inc., over television stations WBZ (Boston), WBBN (Chicago), WBNS (Columbus), KBTV (Denver), WDSM (Duluth), KTLA (Los Angeles), WTVJ (Miami), KPNO (Phoenix), WCSH (Portland, Maine), WPRO (Providence), KCRA (Sacramento), KUTV (Salt Lake City), KSDV (San Diego), KRON (San Francisco), SSBT (South Bend), KREM (Spokane), KTVX (Tulsa), KFDX (Wichita) and other stations whose names are unknown to plaintiff (p. 28a). Thus, the action skips the boundaries of New York and goes into other jurisdictions not bound by the Civil Rights Law of New York and in consequence not bound by Judge Baer's decision.

Under the decision of *Ettore v. Philco Television Broadcasting Co., supra,* the violation of the plaintiff's rights in each of the above mentioned states gives rise to a cause of action determinable by the laws of that state and that state alone. But certainly the denial of a recovery under the penal statutes of the State of New York (Secs. 50 and 51, Civil Rights Law), particularly where the Trial Judge has ruled that the status of the industry was not pertinent to the trial of the action in New York, cannot prevent the recovery under such violations as are shown to exist in states other than New York.

Speaking of "the appropriation of the performance or production of a professional performer or entrepreneur," Judge Biggs, in *Ettore,* said in pertinent part (p. 487):

> "Where a professional performer is involved, there seems to be a recognition of a kind of property right in the performer to the product of his services. The theory may be summed up as follows: The performer as a means of livelihood contracts for his services with an entrepreneur. The finished product is, for example, a motion picture in which the performer's services are embodied. *If the motion picture is employed for some use other than that for which it was intended by the performer and the entrepreneur, the motion picture is employed in such a way as to deprive the performer of his right to compensation for the new use of the product.*" (Italics supplied.)

The question asked and answered in the negative in the *Ettore* case, page 488, was:

> *"Should a man be deemed to have granted a use, not in existence and not contemplated by either party, at the time the contract of sale was made?"*

In his affidavit in opposition to the motion for summary judgment Dave Fleischer said (111a-115a):

> "The status of the television industry in the year 1941 and particularly on May 24, 1941, did not per-

mit the use of motion pictures and motion picture cartoons for advertising of refrigerators, cereals, bicycles, bread, circuses, dairy products and other commercial products not connected with motion pictures; indeed this means and method of exploitation of motion pictures was unheard of until possibly a full dozen or more years later" (111a).

"In the action which was tried before Judge Baer in the New York Supreme Court I tried to prove the status of the industry in the year 1941 to be as I have above outlined, as not encompassing the use of motion pictures and motion picture cartoons for the sale of refrigerators, iceboxes and other commercial products and Judge Baer refused to permit the testimony saying that it was not relevant or pertinent under the Civil Rights Law nor was it pertinent in the action against National Telefilm Associates, Inc. It could not therefore possibly be an adjudication against me or Fleischer Studios, Incorporated, in this action against the defendants A.A.P., Inc., Associated Artists Productions, Inc., or W.P.I.X., Inc., which is predicated upon the commercial use of the said 119 Popeye cartoons which bear my name and the name of Fleischer Studios, Incorporated" (111a-112a).

"In the year 1941 the television industry as it existed in 1955 and 1956 was unknown and did not exist. There were some broadcasts but they were entirely experimental. The motion picture industry would not and did not permit the television broadcasting of motion pictures and motion picture cartoons as a matter of policy. It was generally felt that the success of the motion picture industry was threatened by the broadcasting of films, and the films were permitted to be lodged in vaults rather than to be used in what was considered a rival industry. It was not until after the end of World War II in the year 1945 that any motion pictures were used for any purpose on the television broadcasts" (114a-115a).

Judge Baer said with respect to the foregoing proffer of proof:

> "If I want to know that, I will read a book. You have made your offer and I told you I am not going to let you bring in any of that testimony. What the contract says I will take" (s. m. p. 563, Baer testimony, 113a).

But the contract of May 24, 1941, could not express and does not express the manner of exploitation of film cartoons for television purposes which were unknown to the industry at the time the contract was made.

The question which remained open before Chief Judge Ryan and which he refused to pass upon was this use in the exploitation of films by all of the defendants in a manner not contemplated by the parties to the Fleischer-Paramount contract because such use and exploitation was unknown to the parties. This was error.

3. The finding by Judge Baer that Paramount Pictures Corporation had the right to assign the contract of May 24, 1941, or sell the film cartoons to N.T.A. and P.R.M., Inc. (predecessor of Associated Artists Productions, Inc.), cannot be used as it was by Judge Ryan to eliminate the obligation of Paramount Pictures Corporation and the remaining defendants who have succeeded to and used the properties of Fleischer Studios for profit, to account for the moneys and properties so used and acquired.

(a) Paramount received $1,500,000 from the sale of the Popeye cartoons alone. It has not accounted for the sale of a single one of these cartoons. There were 12 included in the new cartoons covered by the agreement of May 24, 1933 (99a). Judge Ryan has ruled that it must not account for any part of this money and the U. S. Court of Appeals agreed with this ruling.

(b) Paramount received $500,000 from the package sale of six motion pictures including "Mr. Bug Goes To Town" from National Telefilm Associates, Inc., plus a percentage

of the income for which it has not accounted (39a). There was no allocation made by Paramount for the motion picture cartoon "Mr. Bug Goes To Town" out of this sum of $500,000. Is Paramount free to keep this money without accounting in this action because Judge Baer ruled that it had the right to sell the cartoons? Judge Ryan has held that it need never account for this money or any part of it and the U. S. Court of Appeals agreed with this ruling.

(c) Defendant Paramount Pictures Corporation turned over to National Telefilm Associates, Inc. (107a), positive prints of the film cartoon "Mr. Bug Goes To Town" which cost Fleischer Studios the sum of $82,555.96. No credit was given to the plaintiff nor to Fleischer Studios for these positive films which were received and used by National Telefilm Associates nor has Paramount ever accounted for the above item (107a). Judge Ryan has held that it need never do so and its obligations are at an end because of the trial before Baer, J. Although Judge Baer had no jurisdiction to compel an accounting by Paramount, Judge Ryan has held that Judge Baer's decision works a collateral estoppel and the U. S. Court of Appeals agreed with this ruling.

(d) By an assignment dated June 27, 1956, defendant King Features Syndicate, Inc., for the sum of $750,000 assigned to P.R.M., Inc. (predecessor of Associated Artists Productions, Inc.), "all television rights (as the art of process of television projection or exhibition is now or hereafter known) throughout the world, in and to all such motion picture cartoons (119 in number) based in whole or in part upon said comic strip entitled 'Thimble Theatre Starring Popeye'" (118a). In short King Features Syndicate gave an authorization to P.R.M., Inc., to use the 119 Popeye cartoons directed by Dave Fleischer and bearing his name as "director" in the manner now known to the industry for commercial exploitation, when in fact no such

method of exploitation was known to the industry in the years 1932 to 1942 when the said "Popeye" cartoons were produced by Fleischer Studios, Incorporated. Under the doctrine of the *Ettore* case, *supra*, both King Features Syndicate and Associated Artists Productions, Inc., are accountable to plaintiff, because no such issue was tried by Judge Baer. Judge Ryan has held that none of the defendants are accountable to plaintiff because of the doctrine of collateral estoppel. Judge Ryan has held:

> "The liability asserted against the defendants arose from an alleged breach of contract. It follows that a finding of no breach of contract by Paramount is a finding of no liability on the part of any of these defendants since the essential element of the case against them is a breach of contract" (160a).

(e) But this reasoning by Judge Ryan is erroneous. It is illogical. Paramount might not have breached its contract by assigning to P.R.M., Inc., nor to N.T.A. but it is nevertheless accountable for the moneys which it has received as the proceeds thereof. In the answer of N.T.A. it is alleged that "ownership of the cartoon (Mr. Bug Goes To Town) was transferred to Rainbow Productions, Inc. (predecessor of N.T.A.), and on September 28, 1956, all of the issued and outstanding capital stock of Rainbow Productions, Inc., was sold to N.T.A. under an agreement which preserved (Fleischer) Studios' rights under the agreement of May 24, 1941, to participate in proceeds derived from distribution of the cartoon after recoupment of Paramount advances" (104a).

(f) The advances of Paramount and the tortious failure of Paramount to plaintiff's damage to realize profits from the cartoons, while they were in the possession of defendants, and the sale of the cartoons to others are matters cognizable under the first cause of action (see opinion of

Palmieri, J., 63a). Judge Ryan has held otherwise and the U. S. Court of Appeals agreed.

(g) It is not denied that Dave Fleischer was the creator of the heavy known as "BLUTO," the villain in the Popeye series. The history of this creation is set forth at pages 119a to 123a of the appendix. For the purposes of this motion for summary judgment it must be taken as true that Dave Fleischer created the character "BLUTO" in his own image and was the inventor of said character.

It is provided in paragraph TWENTIETH of the May 24, 1941, agreement that:

> "Paramount shall have the sole complete, entire and exclusive right to use and exploit (and to cause to be used and exploited) any and all characters created for or used in any of the new cartoons, in any manner and form and by any means whatsoever now or hereafter known or devised, in the discretion of Paramount, including but not limited to commercial and publicity tieups, dolls, books, songs, records, designs for imprinting on fabrics and other materials, accessories of whatsoever nature, radio and television programs, and for use in, on or with commercial articles of whatsoever nature."

But this grant is subject to the payment of fifty per cent of the net amounts received of any and all income derived by Paramount from such use and exploitation (see Par. TWENTIETH, p. 45, agreement, May 24, 1941).

Therefore anyone succeeding to the rights of Paramount must pay to plaintiff, and to Fleischer Studios, 50 per cent of the amount received by them from such exploitation of the character invented by Dave Fleischer named "BLUTO."

The granting of summary judgment without a trial of the above issues deprives the plaintiff of his property without due process of law.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

KAUFMAN, *Circuit Judge:*

In a seemingly endless series of diffuse complaints, filed in both state and federal courts, plaintiff-appellant Dave Fleischer has alleged that Paramount Pictures Corporation and its co-defendants have deprived him of his proper share of the proceeds to various motion-picture cartoons. The present action, seeking an accounting, was originally filed in October of 1957; an amended complaint, adding a cause of action for alleged antitrust violations, was served the following month. In July of 1959, Judge Palmieri dismissed the antitrust claim, and refused to permit Fleischer to appear in the capacity of "receiver" of Fleischer Studios, Inc., a long defunct Florida corporation, 180 F. Supp. 717 (S. D. N. Y. 1959); plaintiff's second amended complaint, once again requesting an accounting, was finally dismissed on a motion for summary judgment by Chief Judge Ryan in September of 1963. 222 F. Supp. 40 (S. D. N. Y. 1963).

Apart from the merits of Fleischer's claims, several factors justify the dismissals below, which are hereby affirmed.[1] When the conclusory allegations of the complaints are pierced, be they characterized as "antitrust" or "accounting" claims, it becomes apparent that plaintiff is simply asserting that Paramount has violated the express or implied terms of a 1941 contract. And since that agreement was not with Fleischer individually, but with Fleischer Studios, Inc., it is equally clear that Fleischer may not secure a personal recovery for an alleged wrong done to his corporation. While plaintiff attempts to invoke his status as "trustee in dissolution" or "receiver" of the corporation, he is nonetheless barred

[1] Fleischer's appeal from Chief Judge Ryan's award of summary judgment also brings up for review Judge Palmieri's earlier order, previously nonappealable, and interlocutory

Under Florida law, corporate claims not dealing with Florida real estate abate three years after the corporation is dissolved, *Fla. Stat. Ann.* §§608.29, 608.30 (1961); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 917-19 (S. D. N. Y. 1955), and the present suit was filed more than eleven years after the demise of Fleischer Studios.

Although it is not necessary to consider the point, most if not all of Fleischer's allegations are also foreclosed to him on grounds of collateral estoppel. The rights and obligations of Paramount under the 1941 contract, as well as Fleischer's inability to recover for injuries suffered by his corporation, issues central to the instant case, were determined adversely to the plaintiff by the New York State courts in *Fleischer v. W. P. I. X., Inc.*, 30 Misc. 2d 17, 213 N. Y. S. 2d, *appeals dismissed*, 14 A. D. 2d 846 (1961), *appeals dismissed*, 11 N. Y. 2d 876, 227 N. Y. S. 2d 913, *appeals dismissed*, 371 U. S. 16 (1962). Although Paramount was not a party to the New York litigation, both this court and the New York Court of Appeals permit a prior judgment to be invoked defensively as against the unsucessful party in the prior action, where the issues are the same and have been fully litigated. *Zdanok v. The Glidden Co.*, —— F. 2d —— (2nd Cir. 1964); *First Congregational Church v. Evangelical & Reformed Church*, 305 F. 2d 724 (2nd Cir. 1962), *Israel v. Wood Dolson Co.*, 1 N. Y. 2d 116, 151 N. Y. S. 2d 1 (1956).[2]

Although critical of Fleischer's attorney, Chief Judge Ryan denied Paramount's motion for an allowance of $15,000 counsel fees, and Paramount has filed a cross-appeal from his decision in this regard. While the con-

[2] The New York suits, although consolidated for trial, were brought separately against W. P. I. X., Inc., and N. T. A. Pictures, Inc. Since both W. P. I. X. and U. M. and M. TV Corp., N. T. A.'s wholly-owned subsidiary, are parties defendant to the present action, the case for invoking the earlier judgment is all the stronger.

duct of Fleischer's counsel was properly disapproved, we affirm Judge Ryan's refusal to tax Fleischer with Paramount's attorneys' fees. American courts have traditionally refused to include counsel fees in a losing party's bill of costs, except in the most extraordinary of instances, and have virtually never awarded such fees in an action at law. Every litigant, regardless of the seeming frivolity of his claims, is entitled to have them determined on their merits, and not to be "taxed out of court." When viewed in this light, the District Court's action was entirely proper.

APPENDIX B.

LAWS OF FLORIDA (1935)

CHAPTER 16880—(No. 109).

HOUSE BILL NO. 426

AN ACT Providing for the Clearing of Inactive, Dormant and Dead Corporations from the Corporation Files in the Office of the Secretary of State, and for the Dissolution or Cancelling Permits of those Inactive, Dormant and Delinquent Corporations Delinquent for a Period of Three Years Under Chapter 14677, Acts of 1931, Providing for How Notice Shall be Given and for a Proclamation Dissolving or Cancelling Permits of the Same.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That all corporations on file in the office of the Secretary of State, subject to pay a capital stock tax under Chapter 14677, Acts of 1931, Laws of Florida, which have failed for a period of three years to file reports and/or pay such capital stock tax, shall be classed as inactive and subject to be dissolved, or in the case of foreign corporations shall be subject to have their permits to do business in this State cancelled.

Section 2. It shall be the duty of the Secretary of State to make up a list of all such corporations subject to be dissolved or permits cancelled on the first day of January of each year and shall give notice by publication by publishing in a newspaper one time in the county in which the home office of the corporation is located in the case of domestic corporations, and in a paper published in Tallahassee, Florida, in the case of foreign corpora-

tions, giving notice that a Proclamation dissolving or cancelling the permits of such corporations will be issued three months after the date of publication. The expense of the above requirement to be paid from the Capital Stock Tax Expense Fund.

Section 3. Any such corporation which files reports and pays all back taxes due before the issuance of such Proclamation shall have all of its corporate rights restored and shall not be dissolved or its permit cancelled as provided in this Act.

Section 4. Three months after the date of publication of the notice above mentioned the Secretary of State shall prepare a list of the delinquent corporations contained in the published notices above mentioned and which have not, in the meantime, filed the reports and paid the tax due, and certify such list to the Governor who shall issue a Proclamation and cause the same to be attested by the Secretary of State under the Great Seal of the State dissolving or cancelling the permits of such delinquent corporations listed in the notices provided in Section 2 of this Act and which have not filed reports or paid taxes as provided in Section 3 of this Act, and the Secretary of State shall record the same in his office.

Section 5. The Secretary of State is hereby authorized to remove from his active files the names of all corporations dissolved or which have permits cancelled as above mentioned but shall keep them filed in a file labelled "Dissolved Corporations," and the names of such dissolved corporations and those having permits cancelled shall be available for use by any new corporations being formed or foreign corporations qualifying in this State.

Section 6. A list of all delinquent corporations dissolved or which have had permits cancelled under the

provisions of this Act shall be filed with the Clerk of the Circuit Court in each County in Florida; the Clerk of the Circuit Court is hereby required to file the same, without charge, but is not required to record it.

Section 7. Any judgment previously secured against any such corporation shall remain in full force and effect against any assets of the corporation and any suit in progress may be continued without being affected by the dissolution of the defendant corporation.

Section 8. If any Section, Clause, Sentence or other portion of this Act be declared invalid or unconstitutional, it shall in nowise affect or invalidate any of the remaining parts hereof.

Section 9. The directors of any corporation dissolved under the provisions of this Act shall be trustees for any property that may be owned by such corporation and shall handle and dispose of the same for the benefit of the stock-holders but the corporation as such, after being dissolved, shall have no corporate rights or be authorized to transact any business as a corporation.

Section 10. All laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Section 11. This Act shall take effect on June 30th, A. D. 1935.

Approved May 17, 1935.

Filed in Office Secretary of State May 18, 1935.

APPENDIX C.

LAWS OF FLORIDA CHAPTER 10096 (1925)

ARTICLE XIII

Dissolution.

Sec. 44. If it should be deemed desirable, in the judgment of the Board of Directors, and most for the benefit of any corporation organized under this Act, that it should be dissolved, the Board may adopt a resolution to that effect and call a meeting of the stockholders having voting power on a proposal to dissolve to take action upon the resolution so adopted. Such meeting of the stockholders shall be held upon notice given as provided in Section 24 of this Act and if at such meeting or any adjournment thereof the holders of record of stock entitled to exercise two thirds of all the voting power shall by resolution consent that the dissolution shall take place, a copy of such resolution together with a list of the names and residences of the directors and officers, certified by the President or a Vice-President and the Secretary or an Assistant Secretary and the Treasurer or an Assistant Treasurer, shall be filed in the office of the Secretary of State, who, upon being satisfied that the requirements aforesaid have been complied with, shall issue a certificate that such resolution has been filed and shall cause such certificate to be published in one issue of a newspaper published in the County where the principal office of the dissolved corporation was situated. The Secretary of State shall ascertain the charge for publishing the certificate of dissolution as aforesaid, and collect the amount from the corporation before the certificate of dissolution is issued; and upon the filing in the office of the Secretary of State of

an affidavit of the manager or publisher of the said newspaper that said certificate has been published once, in said newspaper, the corporation shall be dissolved. Whenever all the stockholders of record, having voting power on a proposal to dissolve shall consent in writing to a dissolution, no meeting of stockholders shall be necessary, but on filing such consent in the office of the Secretary of State, he shall, as above provided, issue a certificate of dissolution which shall be published as above provided.

Sec. 45. *Continuation of Corporation After Dissolution, for Purpose of Suit, Etc.—All corporations, whether they expire by their own limitations, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their assets, but not for the purpose of continuing the business for which said corporation shall have been established.*

Sec. 46 *Trustees Under Dissolution.*—Upon the dissolution of any corporation under the provisions of Section 44 of this Act, or upon the expiration of the period of its corporate existence, limited by its certificate of incorporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell, and convey the property, real and personal, and divide the moneys and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations; or, after paying or adequately providing for the liabilities and obligations of the corporation, such trustees, with the written consent or vote of stockholders of record holding stock in the corporation entitling them to exercise at

least a majority of the voting power on a proposal to sell all the property and assets of the corporation may sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other State, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in proportion to their interest therein, but if any stockholder within thirty days after the mailing of notice to him of such sale, shall demand in writing that such corporation shall pay to him the fair cash value of his interest in the assets sold, such cash value shall be determined as provided in Section 38 of this Act, and shall be paid by said corporation within thirty days after such appraisal shall have been confirmed by the court.

Sec. 47. *Trustees Under Dissolution; Powers and Liabilities.*—The persons constituted trustees as aforesaid shall have authority to sue for and recover the aforesaid debts and property, by the name of the trustees of such corporation, describing it by its corporate name, and shall be suable by the same name for the debts owing by such corporation at the time of its dissolution, and shall be responsible fos such debts, to the amounts of the moneys and property of such corporation which shall come into their hands or possession.

Sec. 48. *Dissolved Corporations; Receivers for, How Appointed; Powers.—When any corporation organized under this Act shall be dissolved or cease to exist in any manner whatever, the Circuit Court sitting in Chancery on application of any creditor or stockholder of such corporation, at any time, may either continue such directors, trustees as aforesaid, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with*

power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of such trustees or receivers may be continued as long as the Circuit Court shall think necessary for the purposes aforesaid.

Sec. 49. *Jurisdiction of Circuit Court.*—The Circuit Court sitting in Chancery shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require.

Sec. 50. *Trustees or Receivers; Duties of.*—The said trustee or receivers after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of such debts and necessary expenses (or the making of adequate provisions therefor), they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives.

Sec. 51. *Dissolution; No Cause for Abatement of Actions; Suggestion on Records; Action; Continued Against Trustees or Receivers.—If any corporation organized under this Act becomes dissolved by the expiration of its charter or otherwise, before final judgment obtained in any action pending or commenced in any Court of Record of this State, against any such corporation, the said action shall not abate by reason thereof, but the dissolution of said corporation being suggested upon the record, and the names of the trustees or receivers of said corporation being entered upon the record, and notice thereof served upon said trustees or receivers, or if such service be impracticable upon the counsel of record in such case, the said action shall proceed to final judgment against the said trustees or receivers by the name of the corporation.*

APPENDIX D.

CHAPTER 608.29 LAWS OF FLORIDA (1957).

608.29 Dissolved corporations; receivers appointed by the court; powers.—

(1) When any corporation organized under this chapter shall be dissolved or cease to exist in any manner whatever, the circuit court, sitting in chancery, on application of any creditor or stockholder of such corporation, at any time, may either continue such directors as trustees, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purpose aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of such trustees or receivers may be continued as long as the circuit court shall find necessary for the purposes aforesaid.

(2) The circuit court shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require.

(3) Such trustees or receivers, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the property and funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation if

the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in such manner as provided by order or decree of the court for that purpose. They shall, if there be any balance remaining after the payment of such debts and necessary expenses or the making of adequate provision therefor distribute and pay the same to and among those or their legal representatives who shall be justly entitled thereto, as having been stockholders of the corporation.

(4) Trustees or receivers, where appointed, shall make final distribution of assets within such time and in such manner as the court may determine in the order of appointment or in subsequent proceedings.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 252

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

A.A.P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U.M. & M. TV CORP., W.P.I.X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Respondents.

BRIEF FOR RESPONDENT KING FEATURES SYNDICATE, INC. IN OPPOSITION

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IN THE

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No. 252

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Respondents.

BRIEF FOR RESPONDENT KING FEATURES SYNDICATE, INC. IN OPPOSITION

The respondent, King Features Syndicate, Inc., respectfully urges the denial in all respects of the petition of Dave Fleischer for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of the last-mentioned Court rendered herein on March 23, 1964. That judgment affirmed the decision of United States District Court for the Southern District of New York of September 12, 1963 wherein respondent's motion for summary judgment dismissing this action was granted (222 F. Supp. 40).

The attorney for respondent, King Features Syndicate, Inc., has read, and concurs in, the brief to be filed herein

for respondents, Paramount Pictures, Inc., Paramount Pictures Corporation and Flamingo Films, Inc., also in opposition to the instant petition. We support the position taken by those respondents. We submit that the brief of those respondents, particularly Point II thereof, contains so clear and cogent an analysis of the facts of, and the controlling law applicable to, this proceeding that it would seem needlessly repetitive to reargue the matter in a separate brief. Hence, we have not done so. Accordingly, we respectfully request that said brief of respondents, Paramount Pictures, Inc., Paramount Pictures Corporation and Flamingo Films, Inc., be deemed submitted and filed herein in behalf of respondent, King Features Syndicate, Inc.

We wish to make mention of but one specific facet of this case which touches directly said King Features Syndicate. It pertains to the claim of the petitioner that he invented and thus acquired certain rights to the cartoon character "Bluto". Quite apart from the factual issue of who invented that character, and respondent denies that petitioner was such inventor, whatever beneficial right or interest petitioner might conceivably have had in or to the character in question was, we submit, fully transferred to respondent, Paramount Pictures, Inc., under the contract of May 24, 1941 between Fleischer Studios, Incorporated, and the last-mentioned respondent.

By way of conclusion, we submit that the petition herein is completely lacking in merit and should, therefore, be denied.

Respectfully submitted,

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Respondents.

BRIEF FOR RESPONDENTS PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION AND FLAMINGO FILMS, INC., IN OPPOSITION

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IN THE

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Respondents.

BRIEF FOR RESPONDENTS PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION AND FLAMINGO FILMS, INC., IN OPPOSITION

The Opinions Below

The petition for certiorari (p. 2) cites the New York Supreme Court's decision in the related actions of *Fleischer* v. *W. P. I. X. Inc. and Fleischer* v. *N. T. A. Pictures, Inc.*, 30 Misc. 2d 17, but it omits all reference to the appellate court decisions which rendered that judgment final. Those appellate court decisions are reported at 14 App. Div. 2d 846 (1961), *appeals dismissed*, 11 N. Y. 2d 876, *appeals*

dismissed, "for want of a federal question", 371 U. S. 16 (1962).

The judgments therein do indeed, constitute *res judicata* with respect to the first cause of action, which the District Court dismissed on respondent's motion for summary judgment, and also collateral estoppel in the appeal from Judge Palmieri's order dismissing the second cause of action (Opinion of Court of Appeals, App. A, Pet., p. 50). However, as will be shown, there were many other, independently sufficient grounds for the affirmance of the judgment and order below.

In another pertinent opinion herein, reported in 163 F. Supp. 548 (S. D. N. Y. 1958), *appeal dismissed*, 264 F. 2d 515 (1959); *cert. denied, sub nom. Fleischer* v. *Benjamin*, 359 U. S. 1002 (1959), District Judge Herlands construed the first cause of action precisely as construed in the opinion granting summary judgment (222 F. Supp. at 41 *et seq.*), and also found that the petitioner was "unreliable and incredible as a witness so far as concerns his cross-motion," made to disqualify respondent Paramount's attorneys (163 F. Supp. at 569). On appeal from this order, the United States Court of Appeals for the Second Circuit expressly "noted its concurrence" with the decision, as well as another District Judge's decision strongly condemning other false charges made by petitioner (264 F. 2d at 518). It held that petitioner's and his counsel's "strictures are unjustified and unworthy" (at 518), and it characterized their entire proceeding as "dreary and acrimonious" (at 516).

This Court denied certiorari (359 U. S. 1002). It has also denied other petitions for certiorari in matters directly stemming from the opinion of the District Court which dismissed the second cause of action herein. *Garfield* v. *Palmieri*, 368 U. S. 827; 369 U. S. 871.

The Questions Presented

I. Was the second ("antitrust") cause of action legally insufficient and, therefore, properly dismissed, in view of the conjunction of each of the following facts?

a. The alleged violations of the antitrust laws were directed, not against plaintiff-petitioner personally, but against a corporation in which he was merely a stockholder; those violations were predicated on a contract made with the corporation, which expressly excluded rights in any other persons, and petitioner's connection with said contract was limited to his consent thereto as a stockholder and other incidental matters.

b. The Florida statutes applicable to corporations which, like plaintiff's said corporation, did not own any real estate, provide—and have been so construed by all of the courts—that the claims of such corporations vest in its directors as trustees, or in a receiver if appointed, for a period of three years after dissolution and then abate; whereas the instant action was not begun until eleven years after the corporation's dissolution.

c. The alleged antitrust violations stem from the provisions of an agreement made on May 24, 1941, and any damages allegedly sustained thereafter were merely consequential thereto, but no action was commenced until October 14, 1957.

d. The only so-called "antitrust violations" actually alleged in the complaint were provisions in said contract that the motion picture distributor could sell the cartoons produced by plaintiff's corporation "in groups with other motion pictures"; the contract does not permit, nor does the complaint allege, any conditioning of such sale upon the sale of any other pictures.

e. Plaintiff's corporation (which was not an exhibitor) sustained no damage as a result of any alleged antitrust

violation and, furthermore, any such violation was not directly connected with the purchase which petitioner seeks, sixteen years later, to annul.

f. The final judgment of the New York courts against this petitioner, in favor of one of the respondents and another defendant in substantial privity with the respondent distributor, in an action involving the same contractual provisions and subject-matter as the instant one, determined questions "a" and "b" hereinabove against the petitioner.

g. The circumstances and the "time sequence" of the interposition of this cause of action, by an amended complaint served in order to buttress a motion to disqualify respondent's attorneys, indicated, as a District Judge found, bad faith on petitioner's part.

II. Did plaintiff's first cause of action present any triable issue, in view of the conjunction of the following facts?

a. A final New York court judgment had been rendered against this plaintiff in favor of two defendants—one identical with a respondent herein, and the other substantially identical with another respondent and in privity with respondent motion picture distributor—in an action based upon the identical provisions of the identical contract, asserting the identical theories of action, seeking the identical relief, and involving the identical defenses, everyone of which was upheld.

b. Petitioner's theory of action was that the respondent motion picture distributor did not have the right to sell certain "new cartoons", released under the May 1941 agreement, for use in television; however, that agreement expressly and repeatedly vested full title and right of sale for all purposes in said distributor, including their use and sale for "television."

c. The contract in suit was between the distributor and petitioner's corporation, not petitioner, and it expressly provided that only said corporations, and no third persons, should have any rights or benefits thereunder.

d. The Florida corporation dissolution statutes, above referred to, were applicable.

Several of the petitioner's purported "questions presented"—as well as several of the "constitutional provisions and statutes" purportedly involved (Petition, pp. 3-12)—are, as hereinafter shown, actually not involved at all, and many of the "facts" recited are wholly outside the record and inaccurate. Far from being novel, every single question has been decided against the petitioner as matter of elementary law. These adjudications have been made many times, by many courts, in the course of what the courts have described as petitioner's "interminable litigation". *Fleischer* v. *W.P.I.X., Inc. and Fleischer* v. *N.T.A. Pictures, Inc.*, 30 Misc. 2d 17, *supra*, at 26; see also the Court of Appeals' reference to petitioner's "seemingly endless series of diffuse complaints"—Ex. A, Pet., p. 49.

Statement of the Case

At the time of the commencement of this action the complaint contained only the first (termed by petitioner "the accounting") cause of action. Summary judgment was granted dismissing it on each of the four grounds indicated by subdivisions a, b, c and d in Question II above.

This cause of action—as well as prior proceedings relating thereto—is analyzed in the opinion of the District Court herein (222 F. Supp. 40, 41-44). Its gravamen is that the agreement of May 24, 1941 between Fleischer Studios, Incorporated and respondent Paramount did not

give Paramount the right to sell the "new cartoons", released under that agreement, for television (*id.* at 42; answered in Point II, subd. b, *infra*).

The background of the May 1941 agreement, to paraphrase the New York Supreme Court's opinion (30 Misc. 2d at 19-20), is as follows:

> "In 1941 Fleischer Studios was heavily indebted to Paramount and was in financial difficulty. This led to the May 24, 1941 agreement * * * which is the heart of these lawsuits. Under this agreement Paramount purchased outright all of the assets of Fleischer Studios, and agreed to advance money for the production of certain new cartoons."
>
> After the exhaustion of the motion picture market for these cartoons, "there remained * * * [huge sums] which had not been recouped by Paramount. * * * Paramount did not have the means of distribution for television, and consequently entered into several arrangements for the sale of the films in its vault." There still remains an unrecouped balance of almost $800,000 owing to Paramount by reason of the new cartoons.

Petitioner's references to earlier contracts and cartoons are completely irrelevant since, as is pointed out in the opinions in both the instant and the state court actions, the 1941 agreement "explicitly cancelled all prior agreements" and, in consideration for the extinguishment of Fleischer Studios' huge indebtedness, transferred absolutely to Paramount all of its pre-existing cartoons and other assets "without any payment or accounting whatsoever" (222 F. Supp. at 46; 30 Misc. 2d at 21; Ex. A annexed to Compl., Arts. First and Third).

In the jointly tried New York Supreme Court actions of *Fleischer* v. *W. P. I. X., Inc. and Fleischer* v. *N. T. A. Pictures, Inc.* (*supra*, p. 1), petitioner made precisely the same contentions as in its first cause of action here, and

precisely the same defenses were asserted. A final judgment was rendered against plaintiff on each of the three defenses. The court held that the interpretation of the 1941 contract was alone sufficient to dispose of the cases but that, "in the hope of once and for all ending what appears to be interminable litigation" (30 Misc. 2d at 26), it would also pass upon the other two defenses. It held, accordingly, that "plaintiff may [not] sue in his individual capacity" (at 27), and that "[a]ny claims the dissolved corporation may have had * * * are deemed to have abated [under the Florida statutes]" (at 28). The District Court herein ruled, not merely that the New York Court's final judgment constituted *res judicata* or, at the least, collateral estoppel (see Petition, p. 2), but it also upheld, separately and independently, each of the said three grounds for that decision (222 F. Supp. at 41, 49-50).

The second (antitrust) cause of action, although petitioner discusses it first, was not interposed by him until after the issues had been joined and certain proceedings had been conducted with reference to the first cause, and after plaintiff had moved to disqualify Paramount's attorneys. Although the alleged antitrust violations occurred in May 1938, petitioner did not interpose any such cause of action until November 14, 1957—almost 20 years after said alleged occurrence. Accordingly, District Judge Herlands, in his opinion herein, above referred to, stated:

> "The Court is of the clear opinion that the second cause of action of the amended complaint was added in an effort to truss up the previously made motion [for disqualification]." 163 F. Supp. 548, 569 (1958); *appeal dismissed*, 264 F. 2d 515 (2d Cir. 1959); *cert. denied sub nom.* Fleischer v. Benjamin, 359 U. S. 1002.

Argument

To parallel the sequence of the petition, the various, independent grounds supporting the dismissal, on the law, of the second cause of action are set forth in Point I, and the grounds supporting the summary judgment dismissing the first cause of action are set forth in Point II, hereinbelow.

POINT I

The second ("antitrust") cause of action is legally insufficient on no less than seven separate grounds.

In the second cause of action (cutting through the confusion), petitioner charges that Article Twelfth (g) and (h) of the agreement of May 27, 1938, between Fleischer Studios, Inc. and Paramount, reiterated in Article Seventeenth (g) and (h) of their agreement of May 24, 1941—the basic, superseding agreement (*vide supra*)—was somehow in violation of the Sherman Act, as construed "by the decree * * * in *United States of America* v. *Paramount*." On that premise, he alleges that said agreements were "all void, null and ineffective to convey any rights" (32a-36a, 41a *, see also Pet., pp. 11, 14, 24-25).

The contractual provisions objected to merely permitted Paramount to sell and distribute the cartoons "either singly or in groups with other motion pictures," and to cause them "to be exhibited * * * or exploited in theatres * * * owned, controlled, leased or managed by Paramount." The complaint alleges, in conclusory terms, that Paramount, in entering into those provisions, "violated the antitrust laws of the United States of America."

* References to petitioner's appendix in Court of Appeals are indicated by "a" after page number, and references to respondent's appendix in that court, by "b" after page number.

The petition (*e.g.*, p. 14) refers to other, unrelated allegations of this cause of action, which are both irrelevant and invalid. They pertain to alleged transactions between the two corporate parties which preceded their 1941 agreement, and have nothing to do with the antitrust laws (37a-38a). These allegations are utterly irrelevant to this cause of action which, petitioner has at all times emphasized, is based upon "the anti-trust laws" and the "decree" in *United States* v. *Paramount* (*e.g.*, 1a, 60a). Moreover, and in any event, as the Court of Appeals indicated (App., Pet. p. 49), these allegations are subject to precisely the same defenses (hereinafter set forth) as the antitrust allegations.

a. Plaintiff petitioner, as a mere stockholder of the corporation allegedly damaged, may not recover.

In the second cause of action petitioner seeks "a personal recovery for an alleged wrong done to his corporation" (App. A, Pet., p. 49). As the District Court hereinbelow held (180 F. Supp. at 722):

> "The second cause of action does not contain, however, any allegation of facts tending to show any direct injury to plaintiff's commerce as an individual, and it is well established that a shareholder is not entitled to recover, by individual suit, his share of the loss his corporation may have suffered because of a conspiracy to violate the antitrust laws. E.g., Bookout v. Schine Chain Theatres, Inc., 2 Cir., 1958, 253 F. 2d 292."

Other decisions to the same effect include *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956), citing, *inter alia*, *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910) and *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939), *aff'd* 113 F. 2d 114 (2d Cir. 1940); *Gerli* v. *Silk Assn.*, 36 F. 2d 959 (S. D. N. Y. 1929, Thacher, J.).

In order to escape from this settled principle, petitioner (pp. 19-20) has adduced certain wholly incidental provisions of the May 1941 agreement, with respect to consents required of the individual stockholders and other implementation of that purely corporate agreement. Obviously, however, those provisions were not intended to vest any cause of action in the individuals and, indeed, this was expressly so held by the New York Supreme Court in its final judgment. That court squarely repudiated the same contention by plaintiff, and held that the agreement was between Paramount and Fleischer Studios, Incorporated, alone, and that the parties "intended that all of the respective rights and correlative duties set forth therein flow only between Paramount and Fleischer Studios" (30 Misc. 2d at 27).

This intent is clear throughout, from "the preamble" to the end of the agreement, and in addition Article Twenty-Seventh affirmatively precludes any "rights, remedy or claim" in any other "party or person" (Ex. A of Compl.; 30 Misc. 2d at 26-27; 222 F. Supp. at 47). Consequently, as the Court of Appeals here held, petitioner "may not secure a personal recovery", whether "the conclusory allegations of the complaints * * * be * * *, characterized as 'antitrust' or 'accounting' claims" (App. A, Pet., p. 49).

Indeed, the case cited by the District Court, *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F. 2d 292 (2d Cir. 1958), puts petitioner out of court even on the assumption that he sustained a direct loss—which he did not. In that case, Judge Learned Hand, after enunciating the principle above set forth, acknowledged that "the plaintiff alleges that he has an additional claim," based upon the illegal sale of his individual shares, "in pursuance of the original conspiracy" (253 F. 2d at 294). Nevertheless, Judge Hand concluded that even such a claim (which is not made in the instant case) was unavailable, because "the Anti-Trust Acts do not cover such losses" (*ibid.*).

b. Under the Florida corporation dissolution statutes, the cause of action asserted by plaintiff as a trustee or as a receiver abated three years after the corporation's dissolution—i.e., in May 1949.

Petitioner, both in the instant complaint and in his state court complaint (Ex. B, ¶ 1, respondent's motion for summary judgment), cited and requested the court "to take judicial notice" of the Florida statutes providing that the directors of a dissolved corporation "constitute a board of trustees," *viz.*, "§ 608.30 of the Florida Statutes [Title 34]." As both of said complaints expressly allege, a dissolved Florida corporation "shall continue a body corporate for [only] three years after dissolution," and Fleischer Studios, Incorporated, a Florida corporation, "was dissolved by the Proclamation of the Governor of the State of Florida on May 16, 1946" (*ibid.*).

The New York Supreme Court, in the above cited actions by this petitioner against N.T.A. and W.P.I.X., squarely ruled:

> "The above-cited sections [Title 34, §§ 608.29, 608.30] provide that a corporation which has been involuntarily dissolved, as was Fleischer Studios, have a continued life for a period limited to three years after dissolution. Any claims the dissolved corporation may have had, after this three-year period, are deemed to have abated (Walder v. Paramount Publix Corp., 132 F. Supp. 912, 917-919 [U. S. Dist. Ct., So. Dist., N. Y., 1955])." (30 Misc. 2d at 28).

The court accordingly held that any claim asserted by petitioner "in his capacity as trustee" or in any other capacity abated on May 16, 1949, "three years after the corporation's dissolution" (*ibid.*). Here again, both courts below, in addition to holding that decision to be *res judicata*, expressed their full agreement on the merits (App. A, pp. 49-50; 222 F. Supp. at 47-48, 50).

In the leading case of *Walder* v. *Paramount Publix Corp.*, 132 F. Supp. 912 (*supra*), summary judgment was granted against the plaintiffs, who brought suit individually and as trustees of a Florida corporation which had been dissolved more than three years previously. The court held that the continuance of a corporation after dissolution—which, under common law, was "analogous to * * * death"—was limited strictly by the terms of the statutes of the "state of incorporation" (at 917). See, to the same effect, *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631, 634 (1948); *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 35 F. Supp. 566 (S.D.N.Y. 1940). Accordingly, Judge Weinfeld held (132 F. Supp. at 917-18):

> "Once the statutory period has expired the corporation, absent special saving provisions, is defunct for all purposes and the corporation or trustees may not thereafter maintain suit."

Petitioner's persistent invocation of "Chapter 20895 of the Laws of Florida of 1941" (pp. 7-8), in the teeth of the express limitation of said statute to corporations which hold "real property" and the admitted fact that the dissolved corporation had none whatsoever, (*ibid.*; also App. A, p. 50), is incomprehensible. As was held in *Walder* v. *Paramount Publix Corp.*, *supra*, the very fact that the twenty-year term provided in the section cited "is limited to matters involving real property which the corporation holds of record in the State of Florida * * * strongly support[s] the view that the powers granted under [the other statutes] are limited to a lesser period" (132 F. Supp. at 918). That conclusion applies precisely to corporations involuntarily dissolved, under the "Acts of 1935" adduced by petitioner (p. 6), because those very Acts are expressly mentioned in the said real property statute (Pet., p. 8).

Furthermore, petitioner's contrived distinction between voluntary and involuntary dissolutions is contradicted by all of the statutes, and it has been squarely rejected by the United States, Florida and New York courts.

The statute creating the three-year limitation (quoted by petitioner, p. 7, as "Section 45") is clearly of general application, and it expressly provides that it is applicable to "all corporations whether they expire by their own limitations, or are otherwise dissolved." Thus, the Court of Appeals for the Fifth Circuit in *McClung* v. *Hill*, 96 F. 2d 236 (1938) (Petition, pp. 30-31), in affirming a decision by the District Court of Florida, held:

> "Appellants insist that these statutes, though general in terms, do not apply to corporations dissolved as this one was, for nonpayment of corporation taxes. * * *
>
> "We agree with appellees that these statutes, in their general terms, embrace the corporation in question; * * * " (at 238)."

The *McClung* case was cited with approval in the recent Florida decision of *Spector* v. *Hart*, 139 So. 2d 923, 924-26 (D. C. App. Fla. 1962 (Pet., pp. 30-31). In addition, the case was cited in *Walder* v. *Paramount Publix Corp., supra*, at 918, 919, on the precise proposition that "the various sections of the Florida dissolution statute were intended to be read as an integrated whole, and not, as plaintiff contends, a series of unrelated sections" (at 918). It was there held that the sections providing for the functioning of the directors of a dissolved corporation as its trustees "merely prescribe the form and details of the corporation's continued but limited existence" (*ibid.*).

The Florida state courts have also held that the three-year limitation applies to involuntary, as well as voluntary, dissolutions. *State ex rel. Security State Bank of Ft. Ogden* v. *Barker, Circuit Judge*, 141 So. 321.

Petitioner's authorities are wholly inapplicable. Thus, *Gerstel* v. *William Curry's Sons Co.*, 25 So. 2d 560 (Pet., pp. 29-30) merely held that where a corporation had executed a promissory note in favor of plaintiff, and that corporation after dissolution was succeeded by another

corporation which continued its business, acquired all of its assets and assumed all of its liabilities (including, expressly, the said promissory note), the new corporation was liable on the note. In quoting from the opinion, petitioner (p. 30) brashly ends in the middle of a sentence, without so indicating, and omits the court's statement, in the same sentence, that the dissolved corporation "refused to comply and continued in business for more than four years in like manner as if no dissolution had taken place" (25 So. 2d at 562).

Spector v. *Hart* and *McClung* v. *Hill* (Pet., pp. 30-31), as above indicated, support the respondents. Similarly, in *Neville* v. *Leamington Hotel Corp.*, 47 So. 2d 8 (mis-cited as 81, Pet. p. 31), it was held merely that an action might be brought against the dissolved corporation within the three-year period, with an appropriate substitution of the directors as trustees. Contrary to petitioner's contention, the court indicated that a receivership was simply an alternative remedy, and it held that in the case before it there was no necessity for a receiver, since the directors could serve as trustees.

Equally absurd is petitioner's contention that the courts below refused "full faith and credit" to the Florida Circuit Court order of December 19, 1957, "appointing Dave Fleischer the receiver of Fleischer Studios Incorporated" (Pet., pp. 5, 32). In fact, plaintiff did not have himself appointed receiver until after the commencement of this suit by service of his complaint admitting, and after his receipt of an answer alleging, the three-year limitation (see App. Ct. App., p. 54a), and until thirteen and a half years after the dissolution (*id.* at 59a). Manifestly, he could not, at that late date, revivify the defunct corporation or its long extinguished claim. As Judge Palmieri cogently held:

> "There is no warrant for believing that a receiver has any greater length of time within which to commence suit than does a trustee. When a Florida

> corporation is dissolved the Florida courts may either continue the directors as trustees or appoint a receiver. Fla. Stat. § 608.29 (1957), F. S. A.; Neville v. Leamington Hotel Corp., Fla. 1950, 47 So. 2d 8. The result of the exercise of this choice does not affect the length of time within which suits may be brought by or on behalf of the dissolved corporation." (180 F. Supp. at 724-25)

Indeed, in the above-cited New York Court actions by this plaintiff in *Fleischer* v. *W. P. I. X., Inc.* and *Fleischer* v. *N. T. A.*, where plaintiff expressly sued "as receiver" as well as "trustee in dissolution", the court held to precisely the same effect (30 Misc. 2d at 28-29), and its final judgment clearly constitutes a collateral estoppel herein.

That decision applies *a fortiori* since in the instant case plaintiff, who did not contrive his appointment as receiver until after the service of his amended complaint, sought leave to "cure that defect" by filing a supplemental complaint (180 F. Supp. at 725). Judge Palmieri held that plaintiff could not, under those circumstances, file "a supplemental complaint setting forth facts which occurred after the complaint was filed, even if those facts were such as would show that a claim now exists. *Bonner* v. *Elizabeth Arden, Inc.*, 2 Cir., 1949, 177 F. 2d 703, 705" (*ibid.*).

Obviously, the *ex parte* order appointing plaintiff receiver was not denied "full faith and credit", since it could not, nor did it purport to, give plaintiff any greater rights than those permitted under the applicable Florida statutes.

c. The statute of limitations barred this cause of action.

The district court held that this cause of action:

> "* * * was the result of an agreement entered into between certain of the defendants and Fleischer Studios, Inc. in 1941. By that agreement, now immune from attack under the antitrust laws because of the statute of limitations, the defendants, as alleged in the amended complaint, received the right

> to deal with the distribution rights to the cartoons in their discretion. The injury under the antitrust laws, if any, was inflicted when the contract was made. The period of limitation is not extended by the fact that damages from that injury may have continued to accrue. Steiner v. Twentieth Century-Fox Film Corp., 9 Cir., 1956, 232 F. 2d 190, 194-195." (180 F. Supp. 717, at 723)

Among the numerous other authorities to the same effect are *Muskin Shoe Co.* v. *United Shoe Machinery Co.*, 167 F. Supp. 106, 111-12 (D. Md. 1958), citing: *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956); *Miller Motors, Inc.* v. *Ford Motor Co.*, 149 F. Supp. 790, 794 (M. D. N. C. 1957), *aff'd* 252 F. 2d 441 (4th Cir. 1958); *Alexander Milburn Co.* v. *Union Carbon & Carbide Corp.*, 15 F. 2d 678, 680-83 (4th Cir. 1926); *Park-In Theatres* v. *Paramount-Richards Theatres*, 90 F. Supp. 727 (D. Del.), *aff'd per curiam*, 185 F. 2d 407 (3d Cir. 1950), *cert. denied*, 341 U. S. 950.

Since the cause of action accrued on May 24, 1941, the four-year period of limitations under the then applicable statute (15 U. S. C. § 15-b) had expired long before the commencement of this action on October 14, 1957. Nor, as the district court held (at 724) does "the suspension period of • • • 15 U. S. C. A. § 16(b)" help petitioner since, as he concedes (p. 12), it expired in April 1950, one year after the termination of *United States* v. *Paramount*.

The district court's rejection of petitioner's contention of a "continuous wrong" or "conspiracy" (Pet., p. 26; 180 F. Supp. at 724) is supported by all of the authorities. *Mozand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190, 195-96 (9th Cir. 1956); *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (4th Cir. 1934). Precisely in point is *Rutkin* v. *Reinfeld*, 229 F. 2d 248 (2d Cir. 1956), which held:

> "No allegation of conspiracy can thus jump an eight or nine year gap to make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest. Were this not so any bargain which turned out advantageously to the purchaser might be challenged upon a charge of conspiracy made years afterward if any other parties to both sides of the transaction subsequently had further advantageous business dealings with each other" (at 252).

Petitioner's single authority is *Winkler Koch Engineering Co.* v. *Universal Products Co.*, 100 F. Supp. 15 (Pet., p. 26). However, the Court there (at 29) acknowledged the rule as stated here, and drew the clear distinction that in that case there had not been any "completed torts committed against plaintiff" which were time-barred.

The petition reaches another low point when it invokes the Florida statute of limitations providing a period of twenty years in "an action upon a contract • • • founded upon an instrument of writing under seal" (Pet., p. 11). Obviously, this action for alleged antitrust violations, sounding solely in tort, is not so founded; on the contrary, its entire purpose is to avoid and nullify the contract. Furthermore, even the sealed contract referred to expressly provides that it shall be governed by "the laws of the State of New York, irrespective of the place of its execution or of performance" (Ex. A, Compl., ¶ Twenty-Ninth).

d. The complaint actually does not allege any antitrust violation.

Although petitioner has at all times insisted that his second cause of action is based upon a violation of the antitrust laws, the only such violation even speciously alleged is that the 1938 and 1941 agreements permitted Paramount to sell the cartoons "in groups with other motion pictures", that that constituted unlawful "block-booking", and that such practices were thereafter pro-

hibited by the decree in *United States* v. *Paramount* (App., Ct. App., *e.g.*, 33a-36a). However, the contracts do not provide for nor does the complaint allege, the coercive or tied-in sale of groups of pictures, but they provide merely that Paramount has the right to sell more than one picture at the same time. Such right, in the absence of coercion or conditioning, has never been questioned. See *United States* v. *Paramount*, 85 F. Supp. 881, 884, upon which petitioner relies (*e.g.*, pp. 14-15).

e. Even if Paramount had engaged in violations of the antitrust laws, it did not therefore forfeit any of its private contractual rights against Fleischer Studios, nor did Fleischer Studios sustain any damage therefrom.

Petitioner's complaint alleges that because of the unspecified and fantastic antitrust violations by Paramount, its private agreement of May 1941, whereby it received properties from Fleischer Studios, is "void, null and ineffective to convey any rights thereunder" (41a). However, in the leading case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902), at 549, 51, this Court held:

> "As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination * * *."
>
> * * *
>
> "Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it."

To the same effect: *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, especially at 172 (1915); *Bruce's Juices Inc.* v. *American Can Co.*, 330 U. S. 743 (1946) (ironically, quoted by petitioner, p. 24); *A. B. Small Co.*

v. *Lamborn & Co.*, 267 U. S. 248 (1925); *Loughran* v. *Loughran*, 292 U. S. 216 (1933).

In addition, any such antitrust violation as petitioner fantasies would not have damaged Fleischer Studios, which was not an exhibitor or a proper antitrust claimant.

Thirdly, plaintiff's cause of action is predicated upon a conspiracy between defendant and itself or its own "officers, agents and employees" (Pet., p. 17), and such an allegation is legally insufficient. *Sperry Rand Corp.* v. *Nassau Research & Dev. Assoc.*, 152 F. Supp. 91 (E. D. N. Y. 1957), and cases cited at 93.

f. The final judgment of the New York court against petitioner in *Fleischer* v. *W.P.I.X.* and *Fleischer* v. *N.T.A.* effects a collateral estoppel with respect to subpoints a and b hereinabove.

In *Fleischer* v. *W. P. I. X.*, 30 Misc. 2d 17, *appeals dismissed*, 14 App. Div. 2d 846 (1961), *appeals dismissed*, 11 N. Y. 2d 876, *appeals dismissed*, 371 U. S. 16 (1962), as the Court of Appeals here held, "issues central to the case were determined adversely to the plaintiff" (App. A, p. 50). As that Court further held (*ibid.*):

> "Although Paramount was not a party to the New York litigation, both this court and the New York Court of Appeals permit a prior judgment to be invoked defensively as against the unsuccessful party in the prior action, where the issues are the same and have been fully litigated. Zdanok v. The Glidden Co., 327 F. 2d 944 (2nd Cir. 1964); First Congregational Church v. Evangelical & Reformed Church, 305 F. 2d 724 (2nd Cir. 1962); Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 151 N. Y. S. 2d 1 (1956)."

Indeed, there is in fact substantial identity and privity of defendants, including Paramount, by reason of the following facts:

(1) W.P.LX., Inc., the defendant in one of the Supreme Court actions, is also a defendant here, by reason of its acquisition and exploitation of the cartoons in suit (28b); (2) The defendant in the other action, N.T.A. Pictures, Inc., was at all times the sole stockholder of another defendant herein, U. M. & M. TV. Corp., and inasmuch as the latter corporation had previously been dissolved, N.T.A. at all times defended this action in its name (39b); (3) Furthermore, in the Supreme Court action against N. T. A., Paramount was an indemnitor of N. T. A. under an agreement whereby it indemnified N. T. A. "from all damages, losses, etc. in connection with" any claim by plaintiff or Fleischer Studios (Ex. E, Motion Papers for Summary Judgment, referred to in Pet. p. 38); (4) In addition to the relationship of indemnity, there was also privity of property and liability between Paramount and N. T. A., which acquired its new cartoon from Paramount, so that any liability by N. T. A. to petitioner was purely derivative from Paramount's (222 F. Supp. at 44-45, 49).

The New York court decided subpoints a and b hereof squarely against the petitioner. It held, first, that the agreement in suit was solely between the corporations and conferred no rights or standing upon the petitioner individually, despite the incidental clauses adduced by petitioner (30 Misc. 2d at 26-27). It held, secondly, that any cause of action had "abated" under the Florida dissolution statutes, and that petitioner's appointment as a receiver "did not revive a claim which had died * * * in 1949" (at 26-27, 28).

Those determinations constitute a judicial estoppel against petitioner on said two questions (App. A, Pet., p. 50). See also *Hinchey* v. *Sellers*, 7 N. Y. 2d 287 (1959); *Harris* v. *Tarlow*, 33 Misc. 2d 933 (1962); *Ripley* v. *Storer*, 309 N. Y. 506, 517 (1956); *Saphier Agency, Inc.* v. *Green*, 190 F. Supp. 713, 720-21 (S. D. N. Y. 1961); *People* v. *Litt-Chinitz*, 38 Misc. 2d 864, 868-70 (1963); Note, 36 N. Y. U. L. Rev. 1158, 1160-61 (1961).

g. Petitioner was guilty of bad faith in interposing his second cause of action.

Although the alleged antitrust conspiracy was launched as early as May 19, 1938, and damages were allegedly sustained on May 24, 1941, the antitrust cause of action was not asserted until November 14, 1957. It was not even asserted when petitioner first instituted this action in October 1957. As Judge Herlands stated in his opinion denying petitioner's cross-motion to disqualify Paramount's attorneys (163 F. Supp. 548, 569, *appeal dismissed*, 264 F. 2d 515 [2d Cir. 1959], *cert. denied sub nom., Fleischer* v. *Benjamin*, 359 U. S. 1002), *supra*:

> "If plaintiff knew of the alleged conspiracy before he made the instant cross-motion, plaintiff does not explain why he failed to refer to it on November 6, 1957, when he filed the present cross-motion. The first reference to the alleged antitrust conspiracy was made by plaintiff after the present cross-motion was filed."

The court concluded that "[t]his time sequence casts a shadow upon the credibility and good faith of plaintiff" and that the entire cause of action "was added in an effort to truss up" petitioner's unworthy motion to disqualify Paramount's attorneys (*ibid.*).

POINT II

Summary judgment dismissing the first cause of action was properly granted on four separate grounds.

(a) The final judgment of the New York Supreme Court constituted *res judicata*.

As hereinabove indicated (pp. 6-7), the issues under the first cause of action herein were identical with those in *Fleischer* v. *W. P. I. X. Inc. and Fleischer* v. *N. T. A. Pictures, Inc.*, 30 Misc. 2d 17, appeals dismissed, *supra*, pp. 1-2, where final judgment was rendered against this

petitioner. Both complaints "plead a claim of right arising out of the same 1941 contract on the ground that the contract was personal and that Paramount could not lawfully divest itself of its acquired rights by selling the cartoons," and "the defenses • • • [are] identical in substance" (222 F. Supp. at 45).

Consequently, under established New York law, the state court judgment was *res judicata* against petitioner herein, even if there were no identity or privity between the defendants in the state and federal court actions. See, in addition to the cases cited by the Court of Appeals (App., Pet. p. 50). *Gart* v. *Cole*, 263 F. 2d 244, 249 (2d Cir. 1959); *Civoru* v. *National Broadcasting Co.*, 261 F. 2d 716 (2d Cir. 1958, *per curiam*); *Hinchey* v. *Sellers*, 7 N. Y. 2d 287 (1959).

However, as hereinabove shown (p. 20), there was substantial privity and even identity between some of said defendants and priority between the others. Consequently so that even under the old, narrower concept of *res judicata*, which antedated *Israel* v. *Wood Dolson*, 1 N. Y. 2d 116 (1956), this action would be barred: *Hartford Acc. & I. Co. v. First Nat. B. & T. Co.*, 281 N. Y. 162 (1939); *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14, 18-19 (1937); Restatement, Judgments, § 99 (1942).

Petitioner's contention that issues had been "left open for decision in the first case" (p. 37) was demolished by the district court in detail (222 F. Supp. at 43-49), as well as Court of Appeals (App. Pet., p. 50). His principal argument, that the New York court "excluded evidence of the status of the television industry in 1941" (p. 38), actually highlights the identity of the issues in the two actions and indicates that the petitioner is merely seeking a review of the state court's judgment against him.

As demonstrated by the New York court (30 Misc. 2d at 21-24), the 1941 agreement was replete with specific

grants to Paramount of all of the "television," as well as all other, rights and title in the cartoons in suit. Nevertheless, the petitioner there contended, precisely as he does here, that Paramount did not have the right to sell those cartoons for use on television, and it was for that purpose that he sought to introduce the evidence of "the status of the television industry" to which he refers (Pet., pp. 42-43). The New York court properly held that such evidence was inadmissible in view of "[w]hat the contract says" (Pet., p. 44). The courts below held to the same effect, and gave the contract precisely the same interpretation (222 F. Supp. at 46-47).

In petitioner's cited *Ettore* v. *Philco Television Products*, 229 F. Supp. 481 (Pet. p. 42 *et seq.*), the court said (at 487), immediately following the language quoted by petitioner (*ibid.*), that "it is usual today to provide specifically by contract" which rights are conveyed. In the instant contract, the grant of television rights was not only specific, but emphasized by repetition. Actually, the court in the *Ettore* case held that the plaintiff did not have a right under the Civil Rights Law—thereby supporting one of the rulings by the New York court in this petitioner's action against W. P. I. X. It is also significant that this Court denied certiorari in that case.

Petitioner's irrelevant disquisition on "the New York Civil Rights Law" (p. 40 *et seq.*) is also inept. The New York Supreme Court based its decision in favor of W. P. I. X. primarily not upon that statute, but upon the very provisions of the 1941 agreement, which were determinative of its decision against N. T. A. and are determinative here. That court cogently stated:

> "The right to the use of the names was an inextricable part of the absolute ownership rights which Paramount acquired under the May 24, 1941 agreement" (30 Misc. 2d at 31).

(b) (c) and (d) As the courts below also found, "under each of the three grounds underlying that [the New York court's] judgment, even independently of the estoppel effected by it, plaintiff has no claim" (222 F. Supp. at 49-50).

The three other grounds for the granting of summary judgment herein which were precisely the same grounds upon which the New York state court rendered judgment against petitioner after trial—were that: (1) "the agreement of May 24, 1941, about which this suit revolves, vested in Paramount full and complete rights to exploit and sell the cartoons in suit, without plaintiff's consent," (2) "plaintiff has no right or standing to maintain this suit because he was neither a party to the agreement nor a third party beneficiary thereof," and (3) "all claims asserted herein have abated under the applicable Florida law" (222 F. Supp. at 41).

(1) The vesting in Paramount of such "full and complete rights," including the right to sell for "television" purposes, is demonstrated in the New York court's analysis of the pertinent provisions of the agreement (30 Misc. 2d at 21-23), and is also confirmed by Articles Twentieth and Twenty-First (a) and (c) (Ex. A, Motion for Summary Judgment). It is, indeed, not even disputed here.

(2) Petitioner's lack of standing to maintain the first cause of action is even clearer than his lack of standing to maintain the second "antitrust" cause of action, demonstated at page 10, *supra*. The agreement emphatically excludes any rights in any individuals (Ex. A, Art. Twenty-Seventh).

This was also precisely adjudicated, with respect to this very contract, in *Max Fleischer* [plaintiff's brother and a defendant and cross-claimant herein] v. *Paramount Pictures Corp.*, N. Y. L. J., Jan. 24, 1963, p. 13, cols. 1-2 (Sup. Ct., Hofstadter, J.). Similar provisions were unequivocally enforced in *Larkin* v. *Metropolitan Life Ins.*

Co., 28 Misc. 2d 451 (Sup. Ct. 1961); see also *Majestic Mfg. Corp.* v. *L. Riso & Sons Bldg. Co.*, 27 N. Y. S. 2d 845 (Sup. Ct.; not officially reported), *aff'd* 261 App. Div. 1099 (2d Dept. 1941).

(3) The abatement of any corporate claim under the Florida statutes is shown at pages 11-15, *supra*.

The district court properly held that:

> "[S]ince the liability of all defendants arises out of the same issue which was determined, all defendants may claim the benefit of that decision." (160a)

Accordingly, every one of the foregoing defenses applies in favor of each of Paramount's co-defendants-respondents. For each of them, the New York State court judgment is, *res judicata*, and each benefits from plaintiff's lack of standing to sue, as well as the abatement of the action under the applicable Florida statutes (161a).

Conclusion

This petition is singularly devoid of merit, and should be denied. The questions presented involve elementary principles of law and the construction of an unambiguous contract. Moreover, they have been determined against the petitioner, not only once, but repeatedly, by both the state and federal courts, in the course of his "interminable litigation."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 252.

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

A. A. P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. TV CORP., W. P. I. X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Respondents.

BRIEF FOR RESPONDENTS A. A. P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., AND W. P. I. X., INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

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OCTOBER TERM, 1964.

No. 252.

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

A. A. P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. TV CORP., W. P. I. X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Respondents.

BRIEF FOR RESPONDENTS A. A. P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., AND W. P. I. X., INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondents, A. A. P. INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., and W. P. I. X., INC., are concerned only indirectly in the appeal from the order of Judge Palmieri of July 27, 1959, dismissing the second cause of action contained in the first amended complaint and denying the motion of plaintiff for leave to serve a supplemental com-

plaint alleging his appointment as a receiver of the dissolved Florida corporation. 180 F. Supp. 717 (D. C. N. Y. 1959). However, we have read the brief filed by other respondents herein, Paramount Pictures, Inc., Paramount Pictures Corporation and Flamingo Films, Inc. in opposition to the petition for certiorari. We fully subscribe to the position of these respondents as described in said brief.

Respondents, A. A. P., Inc., Associated Artists Productions, and W. P. I. X., Inc. are vitally concerned in the appeal from the order of Chief Judge Ryan of September 12, 1963, granting motions for summary judgments and dismissing the second amended complaint as to all defendants therein. 222 F. Supp. 40 (D. C. N. Y. 1963), affd. 329 F. 2d 424 (2nd Cir. 1964). We have read the brief filed by the other respondents, Paramount Pictures, Inc., Paramount Pictures Corporation and Flamingo Films, Inc. in opposition to the petition for certiorari. The facts and applicable legal principles on which respondents herein rely are fully and carefully presented and analyzed in said brief and it would be an imposition on the Court to reiterate them here. The respondents herein fully subscribe to the position of the other respondents as described in their brief. Accordingly, the Court is respectfully requested to consider said brief to have been filed for and in behalf of respondents herein.

Conclusion.

The petition herein being singularly devoid of even the slightest merit should be denied.

Respectfully submitted,

DANIEL HUTTENBRAUCK,
Attorney for Respondents.

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Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT, DUMONT BROADCASTING CORPORATION

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Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT, DUMONT BROADCASTING CORPORATION

Statement

Although the amended complaint pleads two causes of action, only the first cause is pleaded against respondent Dumont Broadcasting Corporation ("Dumont").

Dumont is mentioned by name in the amended complaint only in Paragraph 23(g) which alleges:

> "(g) Defendant U.M.&M. T.V. Corp. with full knowledge actual or constructive of plaintiff's rights in the premises and that the contract of

> May 24, 1941 was nonassignable has pretended to purchase or has purchased outright the new cartoon The Raven and other film cartoons, the equitable and other property rights to which are in plaintiff individually and as cotrustee of Fleischer Studios, Florida, and defendant Dumont Broadcasting Corporation with like knowledge has broadcast or threatens to broadcast same, without the consent first obtained from plaintiff individually and as cotrustee of Fleischer Studios, Florida, in dissolution, and without compensation to him in said or any capacity."

Dumont is also included within the reference to "all" defendants contained in Paragraph 23(h) of the amended complaint.

Thus, Dumont's involvement in this "endless" litigation is limited to its activities with reference to "The Raven".

Concededly, Petitioner's rights, if any, stem from the contract of May 24, 1941. Dumont is not alleged to have been a party to that contract. Nor are there any allegations in the amended complaint of any dealings between Dumont and Petitioner or between Dumont and Fleischer Studios, Incorporated. There is no privity between Petitioner and Dumont. Dumont's use or threatened use of "The Raven" could not have been in breach of any obligation owed to Petitioner or Fleischer Studios, Incorporated, since it arose from rights granted to it by respondent U.M. & M. T.V. Corp. who in turn obtained its rights from respondent, Paramount Pictures, Inc. (Pet. p. 35).

Thus, aside from other grounds upon which the first cause was dismissed, Petitioner does not even present a colorable claim against Dumont.

Dumont's position with regard to the dismissal of the first cause is ably presented in the brief in opposition being submitted by its co-respondent, Paramount Pictures.

Inc. It would be an imposition on the Court and a mere exercise in style to repeat the facts and controlling legal principles. Accordingly, we hereby incorporate so much of said respondent's brief herein by reference as deals with the first cause of action, adopt same and rely thereon.

CONCLUSION

The first cause of action was properly dismissed. The petition for writ of certiorari should be denied.

Respectfully submitted,

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SELIGSON & MORRIS,
Of Counsel.

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Respondents.

PETITIONER'S REPLY BRIEF.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1964

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The respondents urge in Point I(c) that "The Statute of Limitations barred this cause of action." In the body of the point, they urge that the four-year period of limitation contained in the federal statute, which was not enacted until 1955 and did not become effective until January 7, 1956 (69 Stat. 283, 16 U.S.C., Sec. 16(b), is the applicable statute, thus abandoning the claim that the action abated under Florida law 25

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Respondents.

PETITIONER'S REPLY BRIEF.

Preliminary Statement.

Counsel for the respondents Paramount Pictures, Inc., Louis Nizer (whose "Life in Court" is surpassed only by the exploits of his fictional counterpart "Perry Mason"), resorts to the "BIG LIE" and cuttlefish techniques to defeat this petition for certiorari, *in a case in which there is a crying need for review by this Court of matters of great public importance.* The techniques employed by him are not new, but they are effective if not checked.

By unjustified character assassination, by appeals to hatred, slander and libel, by the vitriol poured upon petitioner and his attorney, which has characterized every attempt to be heard on the merits in this and in the lower courts, and by the downgrading of the questions presented to this Court as "*involving elementary principles of law and the construction of an unambiguous contract*," Mr. Nizer seeks again to becloud the issues and to turn this petition into an *argumentum ad hominem*. The principles of law involved are indeed novel and of great public importance and the contract a complex sixty-page document.

The higher the court the greater the chance of success of these confusing tactics. The limited appellate jurisdiction of the New York Court of Appeals, of the U. S. Court of Appeals, and of this Honorable Court, makes it nigh impossible, in the face of such tactics, to obtain appellate review. It is against these handicaps that petitioner seeks to obtain review in this court. To succeed, petitioner must clarify the issues and remove the penumbra which has been cast over them by respondents' counsel, all of whom rely on Mr. Nizer as lead counsel, for exculpation of their clients. The briefs submitted by the remaining respondents may well be described as "me too" briefs.

The Sham Side Issues of Respondents' Counsel.

"*The Opinions Below*" which are discussed at pages one and two of Mr. Nizer's brief are the initial instances of distortion and irrelevant name calling, which only obscure the vital questions presented for review. For example:

(a) Petitioner and his counsel are taken to task for merely citing the lower Court's opinion (Supreme Court, New York County) of *Fleischer vs. W.P.I.X., Inc., et al.*,

(30 Misc. 2d 17), but omitting "all reference to the Appellate Court decisions which rendered that judgment final." In truth, those appellate decisions did not render the judgment final at all. Those Appellate Court decisions are reported at 14 A. D. 2d 846 (1961), appeal dismissed (for inability to print record) 11 N. Y. 2d 876 (as not final), appeal dismissed "for want of a federal question" 371 U. S. 16 (1962).

The irony of respondents' argument is that the petitioner sought to appeal from the lower Court decision (30 Misc. 2d 17), as a poor person (Rule of Civil Prac., §35), but was denied the right to appeal (14 A. D. 2d 846) on the false contention of the defendants that he (petitioner) had more than $300 in cash or money's worth and should be required to print his record on appeal and exhibits, even though such printing would cost $7,000 which he assuredly did not possess.

From the dismissal of his appeal for lack of prosecution (14 N. Y. A. D. 2d 846) because he could not raise the $7,000 of printing costs, petitioner sought to appeal to the New York Court of Appeals. Again his appeal was dismissed by that court as non-final within the meaning of the New York State Constitution (11 N. Y. 2d 876). On his appeal to this Court upon the ground that "Equal justice under the law" was not dispensed to rich and poor alike in New York State, in permitting the rich to appeal without showing merit if they had the money to print their records, while denying that right to the poor on typewritten records, this Court dismissed said appeal for want of a "substantial federal question" (371 U. S. 16-1962). The lower Court judgment is final on its own account and not because of appellate review.

Although too late to cure the injustice done to the petitioner, it is now a fact that the New York State Legislature (see Civil Practice Law and Rules, Sec. 5529[1]),

cured this patent inequity in the enforcement of its appellate procedures by the enactment in 1963 of the CPLR, which *permits* rich and poor alike to prosecute their appeals by the appendix method, with optional mimeographing of records and exhibits (CPLR, Rule 5529, sub. 1).

There was, in consequence, no appellate review of the decision of Judge Baer in *Fleischer vs. W.P.I.X., Inc., et al.* (30 Misc. 2d 17). Whether said judgment is to be held to be a valid judgment for the purposes of collateral estoppel in the antitrust and accounting actions is to be determined by the lower Court's decision itself and not by the action of any Appellate Court in denying leave to appeal as a poor person, or by the dismissal of his appeal by this Court as not presenting a federal question.

(b) The next opinion which is stated by Mr. Nizer to be "pertinent" (but which has not the slightest relation to the issues to be decided herewith) is the opinion of Judge Herlands which denied disqualification of Louis Phillips and his partner Louis Nizer because of the prior representation by Phillips and Nizer of petitioner, in drawing the very contracts with King Features Syndicate, Inc., which were the subject matter of the within litigation (163 F. Supp. 548—S.D.N.Y. 1958).

Although Louis Phillips, late partner of Louis Nizer, was the lead counsel for Paramount which sought successfully on appeal to review the order of the District Court denying disqualification in the litigation arising out of the antitrust suit (85 F. Supp. 881) of *U. S. A. vs. Paramount*, as an appealable order, Paramount and its attorneys took exactly the opposite point of view on the appeal of petitioner from the denial of disqualification. The U. S. Court of Appeals reversed its position and held that the order denying disqualification in the instant case was non-final and hence not appealable (264 F. 2d 515).

This Court denied certiorari (359 U. S. 1002). The merits of the litigation were not considered.

(c) Not content with this victory (which never reached the merits of the litigation), counsel for Paramount took up a vendetta against petitioner's attorney and sought an opinion from District Judge Palmieri, that said petitioner's counsel had been castigated in the opinion filed on the non-appealable order by the U. S. Court of Appeals. Although the New York Court of Appeals has held that the transmission for publication in an unofficial report, *sua sponte*, by a judge, of his opinions to West Publishing Co., which are libelous of an attorney, renders the judge responsible in libel, for untruthful statements made by him in his opinions, the District Court and the U. S. Court of Appeals have taken a contrary view with respect to federal employees, and this Court denied certiorari (368 U. S. 827, 369 U. S. 871).

(d) There may be no remedy in the Federal Courts for libels committed by federal employees, but the libels remain nevertheless, and there is the undoubted right of the injured to speak his mind and to petition his government or Congress for redress, under the First Amendment. But what relevancy have these sham matters to the questions presented to the Court on this petition for a writ of certiorari, except to becloud the issues, and prejudice the Court against petitioner and his counsel? It is unfortunate that the "BIG LIE" techniques and the cuttlefish tactics of muddying the waters do succeed. The higher the court the greater the chance of success, for such is the burden of work in this court that many petition but few are called to have their grievances heard. Hence the importance of adhering rigidly to essential matters and not being sidetracked by sham issues.

Since the Antitrust Cause of Action is Directed Only Against the Paramount Defendants We Shall Consider the Questions Presented on That Cause of Action in the Order in Which They Are Presented by Said Respondents.

(Answering Paramounts' preliminary statement under Point I, page 8.)

Paramount respondents first urge that the judgment and decree of *United States vs. Paramount Pictures, Inc.* (85 F. Supp. 881, U.S.D.C., S.D.N.Y. 1949), rendered pursuant to the prior opinion of this Court (334 U. S. 131, modifying 70 F. Supp. 53), are irrelevant to the factual allegations in the within case. They conceal the fact that the May 27, 1938 agreement between Fleischer Studios, Inc. (of New York), and Paramount Pictures, Inc., was entered into two months before the Government's antitrust action was commenced charging the entire industry with violations of the Sherman and Clayton Acts and that the May 24, 1941 agreement was exacted from the Fleischer brothers individually and as officers and stockholders of Fleischer Studios, Incorporated (Florida), in the teeth of said then pending Government antitrust action.

During the pendency of the Government antitrust action, both Paramount, its distributors and its co-defendants had worked havoc in the motion picture industry and had brought ruin to producers and theatre owners alike and to the Fleischer Studios, Incorporated, and Dave Fleischer individually. It is a curious coincidence that in May, 1946, Fleischer Studios, Incorporated, had been dissolved for nonpayment of taxes by the action of the Governor of Florida, less than one month prior to the filing of the opinion of the District Court on June 11, 1946 (66 F. Supp. 323), which found that the conspiracy of the industry existed and directed methods of correction which

were found inadequate by this Court (334 U. S. 131). The Supreme Court did find against the continuance of operation of theatres owned vertically by the motion picture companies (defendants) and "set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand" (334 U. S. p. 175): "In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held" (334 U. S. at p. 170). The conspiracy found by the District Court on June 11, 1946 (66 F. Supp. 323), was affirmed by this Court. Justice Douglas said:

> "The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants, a vertical one between each distributor and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price fixing disclosed by the record. We think there was adequate foundation for it too" (334 U. S. 142).

It was not until July 25, 1949 (85 F. Supp. 881), that the District Court rendered its opinion after remand from this Court, and then for the first time applied the remedy which became final. But by that time, it has been held in the within action, that the prostrate Fleischer Studios, Incorporated, had been dead beyond resuscitation by reason of the elapse of three years from the date of its involuntary dissolution by the Proclamation of the Governor of Florida and it has been further held that all of the assets of that corporation had been destroyed and abated by the action of the State of Florida and that the defendant Paramount Pictures, Inc., and its successor Paramount Pictures Corporation, were free to take them all into their possession without accounting for either their antitrust activities or for the properties seized by them. It is therefore meet and proper that the findings of the District Court with respect to the defendant Paramount, as it in its operation effected the downfall of Fleischer Studios, Incorporated,

and Dave Fleischer be recited. Such findings are incorporated by reference in the complaint in the within action (32a-36a, 41a) (85 F. Supp. at p. 889).

"We have been instructed by the Supreme Court to consider the question of geographical distribution of theatres among the five major defendants. In dealing with this subject, we do not take into account the presence or absence of independent theatres in the areas dealt with. We have examined the defendants' theatre holdings and find that in cities of less than 100,000 in population, there is no doubt that Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's. In cities having a population of more than 100,000, there was in general little competition among the defendants, although considerably more than in towns of under 100,000. A summary of the data which substantially represents the true situation, but owing to certain differences in the proofs offered must be regarded as approximate rather than as entirely accurate, is as follows:

CITIES OF LESS THAN 100,000.

"In cities of less than 100,000, Paramount had complete or partial interests in or pooling agreements with other defendants affecting 1,236 theatres located in 494 towns. In 13 of these towns containing 31 of the theatres—or only 3%—there was competition with another defendant. In 9% of these towns competition between Paramount and the only other defendant in the town was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres; and in this 9% were located 10% of Paramount's theatre interests. And in 88% of the towns, containing 87% of Paramount's theatre interests, Paramount was the only defendant op-

erating theatres. Thus it appears that there was little, if any, competition between Paramount and any other defendant in 97% of the towns of under 100,000 and in respect to 97% of the theatres in which Paramount had an interest.

CITIES OF 100,000 AND OVER (p. 890):

"In cities of over 100,000 Paramount had complete or partial interests in or pooling agreements with other defendants affecting 352 theatres in 49 cities. In 18 of these cities, or 37%, containing 91 Paramount theatres, or 26%, there was competition with other defendants. In an additional 10% of the cities containing 17% of Paramount's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 12% of these cities competition between Paramount and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 12% were located 18% of Paramount's theatre interests. And in 41% of the cities, containing 39% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus it appears that there was little, if any, competition between Paramount and any other defendant in 63% of the cities of over 100,000 and in respect to 74% of the theatres in which Paramount had an interest" (p. 890).

"(3) One of the chief matters referred to us by the Supreme Court is the effect of vertical integration upon competition in the industry. *While vertical integration would not per se violate the Sherman Act, the Supreme Court has made it clear that if such integration is conceived with a specific intent to control the*

market or creates a power to control the market which is accompanied by an intent to exercise the power, the integration becomes illegal" (p. 893).

"(4) We are not satisfied that the plaintiff has shown a calculated scheme to control the market in the conception of the defendants' vertical integration, rather than a purpose to obtain an outlet for their pictures and a supply of film for their theatres. But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. We do not suggest that every vertically integrated company which engages in restraints of trade or conspiracies will thereby render its vertical integration illegal. The test is whether there is a close relationship between the vertical integration and the illegal practices. *Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act.*"

To these vertical and horizontal conspiracies found by the District Court, in the case of *United States vs. Paramount* (85 F. Supp. 881), the plaintiff has added the allegations of the antitrust cause of action in this case as it effected the destruction of Dave Fleischer individually and Fleischer Studios, Incorporated. What respondents Paramount and the remaining respondents now contend is that Fleischer Studios, Incorporated, was so completely

destroyed by Paramount as to be beyond resuscitation, by this or any other Court, and that Dave Fleischer individually, had no rights because he was a mere stockholder of the defunct Fleischer corporation. It has been on that simple but outrageous basis that plaintiff has been thrown out of every court to which he has applied for relief, and for which reason petitioner applies to this Court as a court of last resort for the crying remedy to which he is entitled.

I(a). The respondents seek to sustain the dismissal of the individual antitrust suit of Dave Fleischer with the contention that Paramount's antitrust activities "were directed, not against plaintiff-petitioner personally, but against a corporation in which he was merely a stockholder" (Resp. Paramount brief, p. 3, item I(a)). This argument is fallacious (Point I(a), p. 8, Resp. Brief).

Both contracts and the factual allegations of the complaint show that the targets of Paramount were Dave Fleischer and Max Fleischer, individually, who were respectively the "Director" and "Producer" of the motion picture cartoons which achieved world wide renown and which ultimately found their way into the possession of Paramount as a result of the antitrust activities complained of.

Early in the history of the motion picture industry, its actors, directors and producers had operated through corporate forms, for purposes of self protection, with binding obligations enforced upon the individual artist, director or producer as here, by injunctions, options for rehiring and negative covenants. The prime example of this was respondent Paramount, which originated *sub. nom.* as Famous Players-Lasky Corporation (App. 6a). United Artists Corporation (of which Messrs. Benjamin

& Krim, are presently the parent) originated as a vehicle for a exploitation of the talents of Charles Chaplin, Douglas Fairbanks and Mary Pickford. Metro, Goldwyn Mayer (MGM), (before it went public) was the vehicle for the production talents of Samuel Goldwyn and Louis B. Mayer.

The instances of the use of the corporate form to exploit the talents of the individual artist to this day are innumerable. Dave Fleischer and Max Fleischer so operated and were "the guiding spirits" in the production of motion picture cartoons by, Fleischer Studios, Incorporated (App. p. 5a). In addition to the vertical and horizontal conspiracy found by the District Court in *U. S. A. vs. Paramount,* it was against the Fleischers that the antitrust activities of Paramount were directed and it was the individual commerce of Dave Fleischer which was destroyed and interfered with by defendants Paramount. Dave Fleischer was stripped of his assets, his stock was hypothecated as security for corporate loans, he was enjoined from competing with Paramount, subject to other personal interference with his commerce as set forth in pages 18 to 23 of the original petition.

The question as to whether the corporate fiction is to be disregarded to obtain enforcement of an antitrust suit by an artist whose commerce has been interfered with and destroyed should be reviewed by this court as a question of great public importance.

The "Yellow Dog" Contract of May 24, 1941 (Exhibit "A") Considered, as it Destroys the Individual Commerce of Dave Fleischer.

The contract in the within case (Exhibit "A") is a "Yellow Dog" contract which resulted in the virtual enslavement of Dave Fleischer, and has driven him out

of the profession or business which he inaugurated in 1919 from the infancy, as an art form, of the motion picture cartoon. A copy of Exhibit "A," the "Yellow Dog" contract of May 24, 1941, has been furnished to each of the Justices of this Court. It is not difficult to see that although it is made between, Fleischer Studios, Incorporated, and Paramount, it is in reality a means of stripping the two Fleischers (Dave and Max) of their shares in and control of the corporation, stripping them of their film library by means of a stockholders' consent, obtained from both stockholders, Dave and Max Fleischer (Article Second), releasing both Paramount and Fleischer Studios, Incorporated, of all claims of Dave and Max Fleischer, except those contained in Exhibit "A" (Article First); stripping both Dave Fleischer and Max Fleischer of their individually owned patents "used in or intended to be used in or in connection with motion pictures or motion picture cartoons" (Article Second [e]); reserving the use of the names "Fleischer Studios" and "Dave Fleischer" exclusively to Paramount in connection with the film library with which they were endowed by said agreement (Article Fourth). It required Dave Fleischer to continue his services as "Director" for 26 weeks to complete the as yet unfinished "New Cartoons" (Article Sixth). As a condition to permitting Dave Fleischer to produce any other motion pictures than those contracted to Paramount, he was required to do so in his "spare" time and burdened with a requirement to offer the finished product to Paramount at the price that anyone else would pay for same (Article Sixth, page 14); no other producer of pictures would undertake a production thus optioned to Paramount.

Then follows Article Twenty Fourth, which is the indentured servant portion of the "Yellow Dog" contract. It provides:

"If * * * Dave Fleischer shall terminate (his) services and employment as aforesaid, or if * * * Dave Fleischer shall during said period of (26) twenty six weeks or at any time thereafter fail or refuse to perform or be incapacitated from performing, his services as employee of the Producer (Fleischer Studios, Incorporated), for any reason whatsoever, or upon the termination of this agreement by Paramount or upon the expiration of the period of time provided for in this agreement, it is agreed that (and the Producer shall cause * * * Dave Fleischer to perform and observe the terms, provisions and conditions of subdivisions [b] and [c] and [d] of this Article Twenty-fourth)" (p. 52, Exhibit "A").

Said subdivisions (b) and (d) are as follows:

Article Twenty Fourth (b) of the contract contains a negative covenant restraining Dave Fleischer from the use of his own name directly or indirectly after the termination of his employment or of the names, "Fleischer of Fleischer Studios, in or in connection with the production, distribution, exhibition, television, performance reproduction, use exploitation of any motion picture cartoon whatsoever for a period of one (1) year" after the termination of his employment "AND THEREAFTER SUCH PERSON (DAVE FLEISCHER) SHALL BE ENTITLED TO USE HIS OWN NAME (BUT NOT THE NAMES "FLEISCHER STUDIOS," OR "DAVE FLEISCHER STUDIOS") IN CONNECTION WITH MOTION PICTURE CARTOONS ACTUALLY PRODUCED BY HIM" (pp. 52 and 53 of Exhibit "A").

Under Article Twenty-fourth (d) the negative covenant in subdivision (b) above was to apply even if the contractual relationship was terminated by Paramount, and at any time (p. 53, Exhibit "A").

By Article Twenty-eighth of the contract, Max Fleischer and Dave Fleischer were to deliver their resignations in blank to Paramount, as well as their shares of stock endorsed in blank with the "sole and exclusive voting power of said shares of stock during the period of this agreement including *any option periods hereunder*, and in connection therewith (Paramount), shall have the right to cause itself or its designee to become a stockholder of record in the Producer (Fleischer Studios, Incorporated) (p. 60, Exhibit "A").

The option periods referred to above are five successive options contained in Article Twenty-third of the Agreement Exhibit "A" commencing May 24, 1942, and ending May 23, 1947, to call upon Fleischer Studios, Incorporated, to produce additional motion picture cartoons.

Finally, by a separate agreement attached to and made a part of Exhibit "A," Dave Fleischer and Max Fleischer individually were required "to approve the use of their names, the name 'Fleischer' and the name 'Fleischer Studios,' all as more fully provided in said Agreement" and to "execute, verify, acknowledge and deliver, * * * to Fleischer Studios, Incorporated, or to you (Paramount) such deeds, assignments, stock certificates, resignations, instruments and documents * * * as you may from time to time request and designate, in connection with any of the matters contained in or referred to in any of the provisions of said Agreement between you (Paramount) and Fleischer Studios, Incorporated" (see letter agreement attached to Exhibit "A").

Despite the contrary allegations contained in the comprehensive antitrust complaint showing personal interference with and destruction of the plaintiff's commerce individually, District Judge Palmieri dismissed the plaintiff's claim of individual destruction of his rights by the

defendants (180 F. Supp. 717) with the cavalier statement that (60a):

> "The second cause of action does not contain, however, any allegation of facts tending to show any *direct injury* to plaintiff's commerce as an individual, and it is well established that ***a shareholder is not entitled to recover, by individual suit, his share of the loss his corporation may have suffered because of a conspiracy to violate the antitrust laws.*** E.g., *Bookout vs. Ching Chun Theatres, Inc.*, 253 F. 2d 292 (2d Cir. 1958)."

And those stalwart champions of the rights of the individual Circuit Judge Kaufman (who integrated the New Rochelle, New York, public schools), and Circuit Judge Marshall (*"You have to give hope to a man who has a foot on his neck" New York Times, August 11, 1964, page 11, column 3*) said after hearing the plaintiff's complaint of individual interference with his commerce by the antitrust activities of the defendants Paramount at 329 F. 2d 425:

> "When the conclusory allegations of the complaints are pierced, be they characterized as "antitrust" or "accounting" claims, it becomes apparent that plaintiff is simply asserting that Paramount has violated the express or implied terms of a 1941 contract. *And since that agreement was not with Fleischer individually, but with Fleicher Studios, Inc.,' it is equally clear that Fleischer may not secure a personal recovery for an alleged wrong done his corporation"* (Petition, Appendix A, p. 49). (*Fleischer v. A. A. P., Inc.*, 329 F. 2d 425.)

It was precisely Dave Fleischer's claim and so alleged in his antitrust complaint that what he did and what he signed on May 24, 1941, was done and signed with a "foot on his neck"; that the purported defaults for want of adequate income which made it possible for Paramount to seize the property of Fleischer Studios, Incorporated, and compel him to consent to the sale and transfer in-

dividually of all of its property (which could not have been accomplished without his individual consent), was done under duress (Complaint par. 32, 33-Appendix, pp. 37a to 39a, inclusive). Petitioner alleged that he executed "a negative covenant restraining said Dave Fleischer from competing with Paramount Pictures, Inc., in the release of the tremendous film library above obtained by them as of May 24, 1941, under duress, coercion and force practiced upon plaintiff * * * as aforesaid" (Appendix 39a).

An enlightened contribution to this problem was made by District Judge Croake (211 F. Supp. 276, [S. D. N. Y.] 1962, re-argued, 213 F. Supp. 123, 1963), in the case of *New Sanitary Towel Supply, Inc., Paul Ullman and Phillip H. Lewis, plaintiffs vs. Consolidated Laundries Corporation; et al., defendants.* There, relying upon and despite the erroneous factual analysis in this very case (*Fleischer vs. A. A. P. Inc.*, 180 F. Supp. 717) Judge Croake held that "the reason for the rule against such recoveries (by a stockholder of a dissolved corporation) is not so much to prevent overlapping recompense to both corporation and stockholders, but is rather to prevent the recovery for injuries which are indirect in nature" a purpose which he said was implicit from the opinion of Palmieri, J., in *Fleischer vs. A. A. P. Inc.* (180 F. Supp. 717). Judge Croake nevertheless held that where the target of the antitrust activities is the individual stockholder who operated a laundry business in corporate form, the individual whose commerce had been destroyed may maintain an antitrust action in his individual capacity. In denying the motion to dismiss the complaint of the individual defendant, District Judge Croake said in pertinent part (p. 278):

> *"Defendants urge that the complaint does not allege actionable harm in asserting that plaintiffs*

Paul Ullman and Philip H. Lewis were coerced into executing the restrictive covenants. They maintain that such injury is not direct and is not an injury to the 'business or property' within the meaning of Section 4 of the Clayton Act.

"'Business or property' has been defined as follows:

"'* * * It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit,—persistent human efforts which have for their end pecuniary reward. It denotes 'the employment or occupation in which a person is engaged to procure a living' *Allen vs. Commonwealth*, 188 Mass. 59, 74 N. E. 287, 288, 69 L. R. A. 599" *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417, 139 A. L. R. 1013 (7th Cir. 1942).

"It is apparent from the complaint that these individual plaintiffs were active in the linen, diaper and laundry businesses for some period of time prior to their, allegedly having been forced to sign the restrictive covenants. Coercion to drive them from their ordinary occupation seems to constitute injury to their 'business or property' within the definition of that term quoted above. Moreover, there is a substantial authority to the effect that depriving a person of his occupation may be actionable under the antitrust laws.

"The gravamen of the complaint is that the damage defendants are alleged to have inflicted was to the businesses of the corporate plaintiffs. There is no explicit allegation that the object of the conspiracy was to harm the business of the individual plaintiffs, or even that the individuals had any particular businesses to harm. However, *a fair inference can be drawn from the complaint that the individual plaintiffs had been engaged, through the corporations, in the laundry, diaper and*

linen businesses. If nothing more had been done than to destroy the businesses of the corporations, then the individual plaintiffs, as such, would have no right to recover. The complaint alleges that defendants went further, i. e., they coerced Ullman and Lewis to give up a right they otherwise would have had, that is, a right to engage in the laundry, diaper and linen businesses. Even though it is alleged that the principal purpose of the conspiracy was to injure the businesses of the corporations, if plaintiffs can show that they were forced out of this field of business activity, it cannot be said, as a matter of law, that they were not injured directly" (p. 279).

"This question might turn upon the nature of the skills needed in the business, the importance of being acquainted with persons and firms in the industry, the good will of the individuals and the corporations, the position and status Lewis and Ullman may have had in the industry, and many other factors. These issues are not before the court on this motion and must be left for trial.

"Defendants further argue that since the restrictive covenants were delivered to corporations which are not defendants in this action and which are not alleged to be co-conspirators, the injury is too indirect. There are, however, allegations in the complaint that defendants compelled the execution of the covenants and that the corporations holding them were controlled by some of the defendants. The execution of the restrictive covenants must, therefore, be deemed to have been compelled by members of the conspiracy. It must also be assumed as a fair inference that the covenants can be enforced by some of the defendants through the allegedly controlled corporations. The connection between the acts complained of and the injuries alleged need not be pleaded with further particularity" (p. 280) (Italics supplied).

On re-argument of *New Sanitary Towel Supply, Inc., et al. vs. Consolidated Laundries Corporation, et al.*, 213

F. Supp. 123, defendants therein cited the cases of *Gerli vs. Silk Association*, 36 F. 2d 959 (S. D. N. Y. 1929 —Thacher D. J.) and *Westmoreland Asbestos Co. vs. Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939) aff'd 113 F. 2d 114 (2d Cir. 1940) in support of their motion, but District Judge Croake denied the motion for re-argument saying:

> "CROAKE, District Judge:
>
> "This motion is for an order granting re-argument of a motion for judgment on the pleadings which was determined by the opinion of this Court, dated November 30, 1962, and filed December 3, 1962, in so far as that motion was denied.
>
> "In support of their application, the defendants cite *Gerli vs. Silk Ass'n of America*, 36 F. 2d 959 (S. D. N. Y. 1929), and *Westmoreland Asbestos Co. vs. Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939) aff'd 113 F. 2d 114 (2d Cir. 1940), *as authority for granting judgment on the pleadings in their favor with respect to causes of action based on covenants not to complete which were executed by two of the individual plaintiffs. They further assert that complaints in these cases contained allegations similar to those in the within case. The decisions in those matters are readily distinguishable from this one.*
>
> *"The allegations in the cited cases are general in nature and refer to destruction of 'good name,' 'credit,' 'reputation,' 'good will,' 'prestige,' and the like, whereas in the instant case there is a specific allegation that defendants coerced said plaintiffs to execute the covenants. In the cited cases, the harm alleged is that which would be expected to flow naturally as incidental effects of the primary damage done to corporate businesses. On the other hand, the allegations in the case at bar would require additional acts on the part of the defendants, which acts, by their very nature, would have to be aimed directly at said plaintiffs.*

"The motion for re-argument is granted, and upon re-argument the original decision dated November 30, 1962, and filed December 3, 1962, is adhered to."

The question so eloquently answered by Judge Croake in 1962, in *New Sanitary Towel Supply Co.* was first postulated by Circuit Judge Learned Hand, in the case of *Bookout v. Schine Chain Theatres* (2d. Cir. 253 F. 2d 292-1958), which case was cited by D. J. Palmieri (1959) in dismissing the individual cause of action of Dave Fleischer. In Bookout, Judge Hand said in pertinent part (p. 295):

> "*As a new question it might perhaps be argued that if a shareholder, or a creditor, or any other person has been injured by a conspiracy under the AntiTrust Acts, a claim arises in his favor quite separate from any claim of the corporation.* Be that as it may, this has not been the course of the decisions, which have distinguished between injuries arising directly from a conspiracy and those that are only 'indirectly' or 'incidentally' its result. Such was the situation in *Loeb v. Eastman Kodak Co., supra*, 183 F. 704, 709; *Westmoreland Asbesto Co. v. Johns-Manville Co., supra*, 30 F. Supp. 389, affirmed 113 F.2d 114; *Peter v. Western Newspaper Union, supra*, 200 F.2d 867, 872, 873; *Productive Inventions v. Trico Products Corp.*, 2 Cir., 224 F.2d 678; and *Gerli v. Silk Association of America, supra*, 36 F.2d 959. These cases decide, not only that the shareholder is not entitled to recover by separate action for his share of the corporate loss, but that for relief from any injury suffered by him individually, even though it has resulted from the execution of the conspiracy, he must look to the general municipal law. *The liabilities that the AntiTrust Acts create are confined to injuries immediately affecting interstate commerce.*" (Italics supplied.)

We respectfully submit that the "new question" postulated by Circuit Judge Hand, in *Bookout*, and cor-

rectly answered by Judge Croake in *New Sanitary Towel Supply, Inc.*, is a bill of rights alike for downtrodden artists, directors of motion pictures, laundrymen, in short artisans or tradesmen of any sort who are oppressed in interstate commerce. This Court should, in the interests of substantial justice grant certiorari to review the judgments appealed from which have thrown the petitioner out of court. *"You have to give hope to a man who has a foot on his neck," whether he be white or black. You cannot rationalize him out of an antitrust claim by saying his claim is "too indirect" or "remote" until you hear the evidence. That is what has been done in this case.*

I(b). The respondents reiterate in Point I(b) of their brief that under Florida corporation statutes, the cause of action asserted by plaintiff as trustee and receiver abated three years after the corporation's dissolution in 1946, i. e., in May, 1949.

Much water has flown under the dam since U. S. District Judge Weinfeld, sitting in the Southern District of New York, rendered the decision in what is described by our adversaries as *"the leading case of Walder v. Paramount Publix Corp."* (132 F. Supp. 912), granting summary judgment dismissing an antitrust cause of action brought against the same defendants, Paramount, by a Florida corporation which had been *voluntarily dissolved*. *Walder* was the identical case relied upon by Judge Palmieri in dismissing the antitrust cause of action in the within case, and which was followed by the New York Supreme Court (Justice Baer) in the two cases tried before him (30 Misc. 2d 17).

To quote from the recent case of *Leggat v. C. I. R.* decided March 20, 1964, by the U. S. Court of Appeals, Second Circuit, where Friendly, C. J., wrote the opinion [illegible] F. 2d [illegible], it must be apparent at this late date that

"In finding a state's law, a Federal Court should not follow mechanically the most recent available statement of an intermediate court but rather must determine on consideration of all relevant factors how the highest court of the state would decide the question if asked today (cf. *Bernhardt v. Polygraphic Co.*, 350 U. S. 198, 205, and concurring opinion of Mr. Justice Frankfurter, 209-212-1956; *Strubble v. Sonnenschein*, 290 F. 2d 185; 188-189 2d Cir. 1962; *Evans v. S. J. Groves & Sons Co.*, 315 F. 2d 335, 2d. Cir., 1963)."

We believe that the most authoritative statement of the Florida law is contained in the case of *Gerstel v. William Curry's Sons Company* (25 So. 2d 560):

> *"the rule of the common law is obsolete and has long been superseded by statute in this state.* Under the law of this state when a corporation is dissolved its assets are first used to pay valid claims against it and if any remain, they should be distributed among its stockholders. We do not think that when a corporation is dissolved by the Governor as provided in Chapter 16880, Act 1935 (Sections 610.16 to 610.18, Florida Statutes 1941) the three-year prolongation period is available for the purpose of closing its business. The very terms of Section 9 of the Act support this view and the decisions of the New York Courts from which state it was derived support it (citing New York cases)."

The respondents scorn the notion that there is a marked distinction between the three-year provision contained in the "voluntary dissolution" Florida statute and the absence of any such provision in the "involuntary dissolution" Florida statute; but it is submitted that the distinction is real. In the instant case the involuntary dissolution of Fleischer Studios Corporation was brought about by the antitrust activities of defendant, Paramount. This is shown by Article Twenty-Fourth of the agreement of May 24, 1941 (Exhibit A) which provides that whether the agreement is terminated by either of the Fleischers or

by Paramount, the name "FLEISCHER STUDIOS" could not be used by them in connection with motion picture cartoons actually produced by them (p. 53, Exhibit A) at any future time without regard to limitation. Furthermore, simultaneously with the execution of the said Exhibit A, both of the Fleischers were required to deliver their certificates of stock which controlled Fleischer Studios, Incorporated, to Paramount, together with their resignations as officers and directors, to be effective during the period of the contract as well as the options thereof which did not expire until May 24, 1947 (Article Twenty-eight, Exhibit A).

Fleischer Studios, Incorporated, was dissolved in May, 1946, by the action of the Governor of Florida. It could have been revived as a corporation at any time up to this date by the mere payment of the taxes in arrears from 1943 to 1946, if the plaintiff, Dave Fleischer, could have acted alone. Unfortunately, without the consent of his late brother, Max Fleischer, Dave Fleischer could not have revived Fleischer Studios, Incorporated. When a corporation is so revived, all of its disabilities vanish, e. g., see *Spector v. Hart*, 139 So. 2d 323 (1962) and *McClung v. Hill*, 96 F. 2d 236 (1938). An analysis of these cases indicates that they "stand for the proposition that under Section 9 of Chapter 16880, Laws of 1935 (Florida), the involuntarily dissolved corporation is not 'dead' but merely without power to carry on business in corporate name or form, which disability may be corrected by the payment of the arrears in franchise taxes that have accrued during the three-year period of non-payment, prior to involuntary dissolution" (see pp. 30-31 of petition for a writ of certiorari). If a corporation may be resurrected then it is not "dead" but merely disabled from carrying on business in corporate form. That is the proper interpretation of the Florida Statute in question, which has been ignored by the Courts below.

The respondents urge in Point I(c) that "The Statute of Limitations barred this cause of action." In the body of the point, they urge that the four-year period of limitation contained in the federal statute, which was not enacted until 1955 and did not become effective until January 7, 1956 (69 Stat. 283, 16 U.S.C., Sec. 16(b)) is the applicable statute, thus abandoning the claim that the action abated under Florida law.

In addition to the vertical and horizonal conspiracies found in *U. S. A. v. Paramount*, the conspiracy was a continuing one as alleged in the complaint designed to remove the competition of the Fleischers from the motion picture industry and to keep their film library from the television field from 1941 until 1956, when it was sold for a fabulous sum by Paramount. Suddenly, these dormant so-called second rate cartoons "directed by Dave Fleischer" and produced by "Fleischer Studios" became the giants of the television industry and have made countless hundreds of millions of dollars for those who acquired them from Paramount.

The doctrine of the continuing antitrust conspiracy, set forth in *Winkler Koch Engineering Co. v. Universal Products Co.*, 100 F. Supp. 15, is clearly applicable to the facts in the within action and not the doctrine of *Rutkin v. Reinfeld*, 229 F. 2d 248, which was not an antitrust case but merely interpreted the New York law with respect to the time for the commencement of an action for fraud and deceit as being required to be started with six years of the discovery of the fraud. In *Rutkin*, the basis of jurisdiction was diversity of citizenship and the U. S. Court of Appeals held that the cause of action accrued at the time when the injury occurred, not at the time of discovery of the fraud.

The within antitrust action does not come within the compass of *Rutkin* but should be brought within the scope of *Winkler Koch, supra.* The proper limitation statute applicable to the facts in the within action is the Florida twenty-year period of limitation "in actions upon a contract, obligation, or liability founded upon an instrument of writing under seal" to be found in Section 95.11 of the Florida Statute of Limitations, quoted at page 11 of the petition. That did not run out until 1961, four years after this action was commenced.

In Point I(d) the Paramount defendants assert that the complaint does not allege any antitrust violations (p. 17, Respondents' Brief).

The block booking of which the petitioner complains is part and parcel of the vertical and horizontal conspiracy which has been found to be illegal by this Court and the District Court in *U. S. A. v. Paramount.* The coercion practiced upon the Fleischers is so clearly spelled out as to make absurd the contention of the Paramount defendants, that "Such right, in the absence of coercion or conditioning has never been questioned."

In Point I(e) the Paramount defendants assert that "Even if Paramount had engaged in violations of the antitrust laws, it did not therefore forfeit any of its private contractual rights against Fleischer Studios, nor did Fleischer Studios sustain any damage."

The first portion of the point relates to the indivisibility of the contract of May 24, 1941, which incorporates both a sale of the Fleischer library of films and all of its assets with the continuing portion of the contract which requires the Fleischers to complete the "New Cartoons" with the same antitrust provisions for distribution con-

tained in the one contract as were contained in the earlier 1938 contract. This point has been fully covered in the petition herein.

The second portion of the point raises the contention that because *U. S. A. v. Paramount* was primarily directed to distributors and exhibitors, that one who delivered his product to Paramount for distribution and exhibition might not be otherwise injured by the antitrust activities of Paramount and its co-defendants. Such injury is and damage is directly spelled out in the complaint by the allegations, *inter alia*, that the remarkable Fleischer cartoon product was block-booked with tenth rate Paramount and other film outputs, and that the Fleischers were given an inordinately low proportion of the joint income. Hence, the Fleischers were in continual debt to Paramount, their product was withdrawn from the market and only released for television purposes in 1956, after their cartoons had been sold outright for a fabulous sum of money by Paramount. The damages suffered by the Fleischers can be easily proven on a trial.

Collateral estoppel and *res adjudicata* considered.

The respondents all contend that the unappealed decision of Judge Harold Baer rendered in the Supreme Court New York County, in 1961, which relied primarily upon the decision of District Judge Palmieri, dismissing the antitrust action, which was rendered in 1959, are *res adjudicata* and constitute a collateral estoppel against the consideration by this Court of Judge Palmieri's decision and of the decision of Chief Judge Ryan in dismissing the accounting action. The Paramount defendants fought for six years to prevent Judge Palmieri's decision from becoming final so that it might be appealed. In the meantime they and those who acquired rights from them have

used Judge Palmieri's decision to obtain dismissal of the actions brought against them.

Rather than an estoppel by judgment this is a case where review has been skillfully prevented by Paramount defendants and they should be refused the right to assert the defense of *res adjudicata*. The original decision of Judge Palmieri should be reviewed by this Court as if it had been reviewed in 1959 before the New York State Court decision had been rendered. If as petitioner contends the decision of Judge Palmieri is erroneous, then the petition for certiorari should be granted. Since the point has been fully covered in our petition we rest thereon.

Respectfully submitted,

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